

K1AHTMC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 696 (PAE)

5 ARI TEMAN,

6 Conference

7 Defendant.

-----x

8 New York, N.Y.
9 January 10, 2020
10 11:00 a.m.

11 Before:

12 HON. PAUL A. ENGELMAYER,

13 District Judge

14
15 APPEARANCES

16 GEOFFREY S. BERMAN

United States Attorney for the

17 Southern District of New York

KEDAR SANJAH BHATIA

18 EDWARD IMPERATORE

Assistant United States Attorneys

19 JOSEPH ANDREW DiRUZZO III

20 JUSTIN GELFAND

Attorneys for Defendant

21 Also Present: William Magliocco, Paralegal Specialist USAO

K1AHTMC

(Case called)

MR. BHATIA: Good morning, your Honor. Kedar Bhatia and Edward Imperatore, for the United States. We're joined at counsel table by Will Magliocco, a paralegal specialist in the U.S. Attorney's Office.

THE COURT: Good morning, Mr. Bhatia.

Good morning, Mr. Bhatia.

And good morning to you, Mr. Magliocco.

MR. DIRUZZO: Good morning, your Honor. Joseph DiRuzzo, on behalf of Mr. Ari Teman.

THE COURT: Good morning.

MR. GELFAND: Good morning, your Honor. Joseph Gelfand on behalf of Ari Teman, who is present and on bond.

THE COURT: Good morning to both of you.

Good morning to you, Mr. Teman.

All right. We have a formidable agenda before us today, and I want to, before marching through it, identify by topic header the sequence of topics I intend to go through. And of course, if I have missed anything, there will be an opportunity at the end for you to raise other issues.

Step one will involve arraigning Mr. Teman on the S2 indictment. I then will take up with the government Rule 16 discovery, what, if any, Rule 16 discovery has been produced since the last conference and whether anything, improbable as it might seem, is outstanding. I will then resolve all of the

K1AHTMC

1 motions *in limine* that are pending in a bench ruling. That
2 will take some time.

3 The next module I will discuss with you is the length
4 of trial and my sitting schedule during the course of the
5 trial, the daily schedule that we have here, just so we're all
6 on the same page. I think of all of you, Mr. Imperatore is the
7 only one who been on trial before me, so I want to make sure
8 all aware of that.

9 I will then have an extensive discussion about aspects
10 of voir dire, including the method that I use for voir dire and
11 including a summary of the case that I intend to present to the
12 venire which I want to run by counsel for their comments. I
13 will then take up issues of courtroom technology with you.
14 Then there will be some mechanical issues about where witnesses
15 are to be questioned from and jury addresses, and the like. I
16 will take up then issues with you about materials I need to be
17 provided to my chambers, whether in the context of 3,500
18 material, exhibit binders, a daily exhibit list, that sort of
19 thing. I want to raise a question about the verdict form. I
20 need to put on the record any plea offers that have been made
21 to the defendant, as far as this is our final pretrial
22 conference, and then there's a final grand jury matter that I
23 have a word or two about.

24 All right. That's the agenda. So that's the sequence
25 in which you can expect me to proceed. Let's begin with the

K1AHTMC

1 arraignment of Mr. Teman.

2 Defense counsel, who will be taking the lead at this
3 conference?

4 MR. GELFAND: I will, your Honor, Justin Gelfand.

5 THE COURT: Very good. Thank you, Mr. Gelfand.

6 Have you had an opportunity to review with your client
7 the questions that I am apt to put to him by way of arraigning
8 him on the S2 indictment?

9 MR. GELFAND: Yes, your Honor.

10 THE COURT: All right. Mr. Teman, I'm going to have
11 Mr. Smallman administer the oath to you; and then I'll ask you
12 several questions to make sure you're of clear mind; that
13 you've read the S2 indictment; and I will receive your plea,
14 which I expect, from counsel's preview, will be a not guilty
15 plea.

16 Mr. Smallman, will you swear the defendant.

17 (Defendant sworn)

18 THE COURT: Thank you.

19 Mr. Teman, you may be seated. What is your full name?

20 THE DEFENDANT: Ari Baruch Teman.

21 THE COURT: How old are you?

22 THE DEFENDANT: 37.

23 THE COURT: How far did you go in school?

24 THE DEFENDANT: College and some additional
25 coursework.

K1AHTMC

1 THE COURT: All right. I know the answer to this
2 question, but are you able to speak and read English?

3 THE DEFENDANT: Yes.

4 THE COURT: I understand that you are presently under
5 the care of a medical professional?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: All right. Apart from what we covered in
8 the robing room, are you under the care of any other medical
9 professional?

10 THE DEFENDANT: Not on any ongoing basis, your Honor.

11 THE COURT: All right. In the past 24 hours, apart
12 from sleep medication, have you taken any drugs, medicine, or
13 pills, or drunk any alcoholic beverages?

14 THE DEFENDANT: No, nothing unrelated to sleep.

15 THE COURT: Does the sleep medication impair your
16 ability to understand what people are saying to you?

17 THE DEFENDANT: I don't believe so.

18 THE COURT: Does it impair your ability to
19 communicate?

20 THE DEFENDANT: No, I don't think so.

21 THE COURT: Does it impair your reasoning ability?

22 THE DEFENDANT: I don't think so.

23 THE COURT: Is your mind clear today?

24 THE DEFENDANT: Feels like it is, your Honor.

25 THE COURT: Is there any reason to think that it is

K1AHTMC

1 not?

2 THE DEFENDANT: No, your Honor.

3 THE COURT: Do you understand what's happening in this
4 proceeding?

5 THE DEFENDANT: Yes.

6 THE COURT: Mr. Gelfand, are you confident that your
7 client understands what's happening in this proceeding and is
8 capable of making an informed plea as to the charges in the S2?

9 MR. GELFAND: Yes, your Honor. For the record, I've
10 spent approximately an hour and a half with him this morning as
11 well.

12 THE COURT: And that confirms your confidence that his
13 mind is totally clear?

14 MR. GELFAND: It does, your Honor.

15 THE COURT: All right. Mr. Teman, have you received a
16 copy of the most recent indictment, the S2 indictment, returned
17 on January 3?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Have you had an opportunity to -- have you
20 read it?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: Have you had an opportunity to consult
23 with your attorneys about it?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Do you want me to read it out loud, or do

K1AHTMC

1 you waive its public reading?

2 THE DEFENDANT: I waive the reading, your Honor.

3 THE COURT: Thank you.

4 How do you plead to the charges?

5 THE DEFENDANT: Not guilty.

6 THE COURT: Having taken care of the arraignment, I
7 think I need to formally ask defense counsel the following:
8 The new indictment does not appear to add new events so much as
9 add charges relating to existing events. Nevertheless, just as
10 an excess of caution, it appears to me that everyone's fully
11 prepared to go to trial on the date indicated, but I want to
12 ask you just to confirm that.

13 MR. GELFAND: Yes, your Honor.

14 THE COURT: Very good. All right. Government, same?

15 MR. BHATIA: Yes, your Honor.

16 THE COURT: Anything else that anyone believes I need
17 to take up by way of arraignment or related events?

18 MR. BHATIA: Nothing from the government.

19 MR. GELFAND: No, your Honor.

20 THE COURT: OK. Let's turn to Rule 16 discovery.
21 Mr. Bhatia, I realize you are a newcomer to the case, and I
22 appreciate your taking it over. Since the last conference, has
23 there been any Rule 16 discovery that the government has come
24 into possession of and/or that has been produced to the
25 defense?

K1AHTMC

1 MR. BHATIA: Yes, your Honor. We've been producing --
2 we made at least two or three productions since then on a
3 rolling basis as we've received documents. Those documents
4 have principally consisted of bank records and email
5 correspondence that we've received from particular witnesses in
6 the case. I think that's sort of the substance of it.

7 THE COURT: What's the scale of the new material?

8 MR. BHATIA: Not too voluminous. I think, for the
9 emails, they were maybe in the 100 to 200 range.

10 THE COURT: 100 to 200 emails?

11 MR. BHATIA: Emails, yes. I don't think it's been
12 particularly voluminous, and we don't expect any voluminous
13 discovery in the future. But, of course, we don't know, but I
14 don't expect any.

15 THE COURT: Is there any outstanding Rule 16 discovery
16 that is in your possession, custody, or control that has not
17 been produced to the defendant?

18 MR. BHATIA: Yes, your Honor. As we get closer to
19 trial, we're producing on a rolling basis, so I think we might
20 have received documents yesterday or maybe the day before that
21 we're planning to produce today, but nothing that we're waiting
22 to produce.

23 THE COURT: Do I have your commitment that, to the
24 extent you come into possession of Rule 16 discovery, you will
25 quite properly turn it around for the defense?

K1AHTMC

1 MR. BHATIA: Yes, your Honor.

2 THE COURT: All right. Defense, anything with respect
3 to ongoing discovery?

4 MR. GELFAND: No, your Honor. We received discovery,
5 as government counsel indicated, on a rolling basis. The most
6 recent production of that was electronically produced
7 yesterday. Because we were traveling, we haven't yet had a
8 chance to review it, but I accept the government's
9 representations as to the nature of it.

10 THE COURT: So far, to the extent you've gotten new
11 discovery, I take it none of it is on a scale that inhibits
12 your trial preparation?

13 MR. GELFAND: No, your Honor. The other thing I would
14 note for the record is that we too, on behalf of the defense,
15 have disclosed Rule 16 discovery to the prosecution in several
16 disclosures, also on a rolling basis, much like the prosecutor.
17 We did have a couple of requests for documents outstanding.
18 Obviously, to the extent that we receive those documents and to
19 the extent that it falls under Rule 16, we'll that provide that
20 forthwith to the government.

21 THE COURT: There's nothing along those line for me to
22 resolve, but I appreciate your giving me a heads-up about that.

23 Nothing further vis-a-vis discovery?

24 MR. BHATIA: Nothing.

25 MR. GELFAND: Correct.

K1AHTMC

1 THE COURT: I'm going to turn now to a bench ruling
2 that I have on the *in limine*. All right. Here goes.

3 Defendant, Ari Teman, has been charged with bank
4 fraud, wire fraud, and aggravated identity theft. His trial is
5 set to begin on January 21, 2020. The Court has received *in*
6 *limine* from Teman and the government and has also received
7 opposition papers from each.

8 The following bench decision resolves all these
9 motions. I will not be issuing a written decision. Instead, I
10 will simply issue an order reflecting the fact that the motions
11 were resolved for the reasons set forth on the record today.
12 So if the content of what I say today is important to you, you
13 will need to order the transcript of this conference, as I
14 expect you would be anyway.

15 All right. I will first going to address the
16 government's motion in limine that relates to Detective Daniel
17 Alessandrino. Alessandrino is a member of the New York Police
18 Department who was present at Teman's arrest in Florida. The
19 defense has subpoenaed Alessandrino for potential testimony but
20 has not indicated the subject matter of this testimony.

21 The government moves that, if called to testify by the
22 defense, Alessandrino's direct examination be limited to
23 relevant, nonhearsay topics. Teman responds that he may not
24 call Alessandrino at all, but if he does so, he will not
25 solicit hearsay testimony.

K1AHTMC

1 On its face, the government's motion does no more than
2 ask the Court to enforce the Rules of Evidence. For whatever
3 value that may have, I can certainly grant that relief, which
4 is completely unobjectionable, insofar as the government's
5 motion does no more than ask the Court to do its job. For
6 future reference, it's not clear what purpose a motion like
7 this serves, but there it is. I remind counsel that any
8 testimony from any witness, whether Alessandrino or anyone
9 else, must comply with the Federal Rules of Evidence, it must
10 be relevant, it must comply with the hearsay rules, and it must
11 satisfy 403.

12 As to Alessandrino's testimony specifically, however,
13 there's nothing concrete at this point for the Court to
14 resolve. I am certainly not going to require the defense,
15 prior to trial, to disclose the subjects of any testimony that
16 Detective Alessandrino might be asked to give. The defense is
17 entitled to keep its strategy to itself. It is not apparent
18 whether Alessandrino would be in a position to offer admissible
19 testimony. The government suggests not, but it is premature to
20 decide. That may turn on developments during the trial. If
21 the defense does decide to call Alessandrino, the Court will
22 ask for a specific offer of proof from the defense so that the
23 Court can determine before he is called to the stand whether
24 there are proper bases for calling him to testify.

25 So, defense counsel, if you are going to go this

K1AHTMC

1 route, please be prepared to give me, outside the presence of
2 the jury, a detailed proffer as to the purpose or purposes for
3 which you would be calling Alessandrino.

4 I'm now going to turn to the government's motion in
5 limine seeking to exclude evidence of specific, noncriminal
6 acts on Teman's part. The government asks that the Court
7 exclude any evidence of noncriminal acts or arguments by Teman
8 to the same effect, to suggest that because Teman complied with
9 the law or treated customers fairly on other occasions, he is
10 not guilty with respect to the crimes charged. As an example,
11 the government envisions that Teman might offer evidence that
12 he did not defraud customers other than Entities 1 through 4,
13 whose checks are at issue here. The government envisions that
14 Teman might argue that this makes it more likely that he did
15 not defraud Entities 1 through 4 either. In response, Teman
16 asks the Court to reserve judgment because the government's
17 motion is addressed to an abstraction, as the government has
18 not pointed to any specific evidence that it is seeking to
19 exclude. Teman promises that, to the extent he seeks to elicit
20 evidence of his law-abiding behavior, he would comply with the
21 Rules of Evidence governing character evidence.

22 Given the general level at which this issue has thus
23 far been briefed, Teman is right that there is nothing concrete
24 to resolve. The Court can do no more at this point than
25 identify the governing legal principles with which I expect

K1AHTMC

1 counsel are already familiar. At a general level, the
2 government's characterization in its contention is right. It
3 is black letter law that "a defendant may not seek to establish
4 his innocence ... through proof of the absence of criminal acts
5 on specific occasions." Citing *United States v. Scarpa*, 897
6 F.2d 63, 70 (2d Cir. 1990); accord *United States v. Williams*,
7 205 F.3d 23, 34 (2d Cir. 2002). Although a criminal defendant
8 may introduce reputation or opinion testimony of a particular
9 character trait, under Federal Rule of Evidence 404(a)(2), such
10 character evidence may not take the form of evidence of
11 specific good acts or the lack of other bad acts. To allow
12 evidence of these specific noncriminal acts could "cause the
13 jury to make a forbidden propensity inference"; i.e., that a
14 defendant's prior good, honest acts suggest that he has a good,
15 honest character, therefore proving that he acted in accordance
16 with such character during the charged incidents. See *Jones v.*
17 *Stinson*, 229 F.3d 112, 120 (2d Cir. 2000). That inference is
18 prohibited by Rule 404(a)(1).

19 Consistent with this, the Second Circuit has time and
20 again upheld the exclusion of evidence of a defendant's lawful
21 acts when offered for this purpose. For example, in the *United*
22 *States v. Walker*, 191 F.3d 326, 336 (2d Cir. 1999), the circuit
23 upheld the exclusion of evidence that a defendant who was
24 charged with preparing false asylum applications had prepared
25 proper asylum applications in the past, because such evidence

K1AHTMC

1 was being offered to disprove that he had acted with fraudulent
2 intent in the case at hand. Similarly, considering a defendant
3 charged with bribery in the *United States v. O'Connor*, 580 F.2d
4 38, 43 (2d Cir. 1978), the circuit held that evidence that the
5 defendant had not received bribes in the past should have been
6 excluded as improper character evidence.

7 That said, there are limited exceptions. Under
8 Rule 405(b), where the defendant's character is an essential
9 element of a charge or defense, such evidence may be admitted.
10 See *United States v. Doyle*, 130 F.3d 523, 542 (2d Cir. 1997).
11 That principle does not appear to be implicated in this case.
12 There are other cases that allow specific incidents of lawful
13 conduct to be received under a defensive application of
14 Rule 404(b), for example, to show that the conduct at issue was
15 part of a common scheme or plan. See *Jones*, 229 F.3d at 120;
16 see also *United States v. Aboumoussallem*, 726 F.2d 906, 911-12
17 (2d Cir. 1984).

18 I cannot do more here than recite those background
19 standards. Teman has not stated an intention to offer evidence
20 along these lines, and he well may not. In the event that
21 Teman intends to elicit proof of noncriminal acts on his part,
22 whether during the examination of government witnesses or as
23 part of a defense case, the Court will require beforehand an
24 offer of proof outside the presence of the jury. The
25 government will then be at liberty to exclude such evidence

K1AHTMC

1 based on the lines of authority that I've just reviewed. I
2 therefore deny the government's motion as premature, without
3 prejudice to the government's right to move anew once a
4 situation involving concrete evidence implicating these
5 principles has crystallized.

6 I will next address the government's *in limine* seeking
7 a ruling permitting it to admit into evidence, pursuant to
8 Rule 404(b), the check stock seized from the defendant's office
9 space on July 3, 2019. I will also address at this point
10 Teman's related motion in limine to preclude the government
11 from offering as yet unnoticed Rule 404(b) evidence.

12 On July 3, 2019, Teman was arrested at his office in
13 Miami Beach, Florida. In connection with the arrest, law
14 enforcement officers seized a ream of "check stock" in plain view
15 in Teman's office. Check stock is specialty paper that an
16 individual can use to print checks. According to the
17 government, each page of check stock looks like an 8.5" x 11"
18 sheet of paper, except the top third is the outline of a check
19 and certain security features, such as a string of text
20 printed in the border of the check frame. The check stock
21 seized from Teman's office space contains security features
22 that appear to be different from the ones on the checks
23 deposited on March 28, 2019, and April 19, 2019, which are the
24 subject of the charges in this case. On December 31, 2019, the
25 government provided notice of its intent to introduce at trial,

K1AHTMC

1 under Rule 404(b), the check stock that was seized from Teman's
2 office on July 3, 2019.

3 Rule 404(b)(1), of course, prohibits evidence of a
4 crime, wrong, or other act being used to show propensity, that
5 on a particular occasion the person acted in accordance with a
6 particular character trait. But Rule 404(b)(2) provides that
7 such evidence "may be admissible" for other purposes, such as
8 to prove "motive, opportunity, intent, preparation, plan,
9 knowledge, identity, absence of mistake, or lack of accident,"
10 provided the probative value of such evidence is not outweighed
11 by the risk of unfair prejudice. *See United States v. Ortiz*,
12 857 F.2d 900, 903 (2d Cir. 1988). Under Rule 404(b)(2), on
13 request by a defendant in a criminal case, the prosecutor must
14 provide reasonable notice of the general nature of any
15 Rule 404(b) evidence that the prosecutor intends to offer at
16 trial and "do so before trial -- or during trial if the court,
17 for good cause, excuses lack of pretrial notice."

18 The Second Circuit takes a "inclusionary approach" to
19 Rule 404(b) under which evidence of crimes, wrongs, and other
20 acts may be received "for any purpose other than to show a
21 defendant's criminal propensity, as long as the evidence is
22 relevant and satisfies the probative-prejudice balancing test
23 of Rule 403." *See, e.g., United States v. Carboni*, 204 F.3d
24 39, 44 (2d Cir. 2000); *see also United States v. Teague*, 93
25 F.3d 81, 84 (2d Cir. 1996), in which the circuit held that the

K1AHTEMC

1 state of mind required for the offense is a "proper purpose"
2 for admission of other crimes evidence under Rule 404(b).
3 Evidence offered for a permissible purpose, however, is
4 nevertheless inadmissible "if the other act or acts are not
5 sufficiently similar to the conduct at issue." United States
6 v. Gordon, 987 F.2d 902, 909 (2d Cir. 1993). Finally, for
7 evidence to be received under Rule 404(b), it must relate to an
8 issue in dispute. For example, in United States v. Scott, 677
9 F.3d 72, 83 (2d Cir. 2012), the circuit found an abuse in
10 discretion in admitting evidence under Rule 404(b) to show
11 identity where identity was not in dispute.

12 So turning to the check stock, the government moves
13 for a ruling permitting it to admit into evidence the check
14 stock seized from Teman's office on July 3, 2019, subject, of
15 course, to the check stock's authentication as such at trial.
16 The government argues that such evidence is admissible under
17 Rule 404(b) as evidence of Teman's motive, intent, plan,
18 identity, *modus operandi*, and the absence of mistake or lack of
19 accident with respect to the charged offenses.

20 The Court agrees and will receive such evidence at
21 trial, subject to its authentication. The blank check stock
22 seized at Teman's office is germane for reasons apart from
23 propensity. It shows his knowledge and familiarity with the
24 process of creating checks and in turn is germane to the
25 government's claim that he did so here by fabricating the

K1AHTMC

1 allegedly unauthorized checks at issue. The average person may
2 not have blank check stock lying around his or her home or
3 office. Teman's possession of check stock, even if it is not
4 identical to the check stock allegedly used in this case, tends
5 to establish his facility and familiarity with material similar
6 to that used in the alleged crimes. The recovery of check
7 stock in Teman's office makes it more likely that Teman, as
8 opposed to someone else, created the specific checks charged in
9 the indictment. It also makes it more likely that Teman knew
10 what he was doing when, using such stock, he created allegedly
11 unauthorized checks with the features and terms those checks
12 contained. And once the check's probative value is recognized,
13 there is no offsetting basis to exclude them. Possession of
14 check stock is not inherently a bad act at all. It is just an
15 act. It does not inherently reflect ill or well on a person's
16 character. And Teman has not made any argument that
17 countervailing factors identified in Rule 403 favor exclusion
18 of the check stock. He's not identified any unfair prejudice,
19 confusion, or delay that may flow from receiving this check
20 stock into evidence.

21 Teman does offer two arguments in opposition to the
22 motion in limine.

23 First, he notes that the check stock was seized from
24 his office in July 2019, after the check deposits at issue,
25 which occurred in late March 2019 and mid-April 2019. But the

K1AHTMC

1 gap between these events is just a few short months. Teman
2 offers no reason why this small passage of time would make his
3 possession of check stock in July 2019 completely nonprobative
4 of his familiarity with the use of check stock just a few
5 months earlier. Nor does he identify any supportive case law.
6 In the Court's judgment, Teman's possession of blank check
7 stock soon after the events at issue may fairly be argued by
8 the government as evidence of Teman's capacity to commit the
9 acts charged in the indictment. *See, for example, United*
10 *States v. DeFiore*, 720 F.2d 757, 764 (2d Cir. 1983), which held
11 other acts admissible under Rule 404(b) "even though they
12 antedated the limitations period." The passage of time instead
13 goes to the weight of the evidence. Defense counsel are free
14 to argue before the jury that the checks found in Teman's
15 office in July 2019 do not speak to his check-creation
16 capabilities three to four months earlier, and the government
17 is free to argue the opposite. That's why we have jurors.

18 Second, Teman argues that the possession of check
19 stock at an office is not inherently incriminating. Under
20 Rule 404(b), that point is a nonstarter. Under the rules,
21 prior acts need not be "bad acts" or inherently incriminating
22 acts to be admissible. They need not be *malum in se*. They
23 need only be relevant, offered for a proper purpose, and more
24 probative than unfairly prejudicial. And prior act evidence
25 that is on its face benign is frequently admitted at trial.

K1AHTMC

1 For example, a defendant's access on a different date to the
2 scene of a crime, such as an office or an apartment or a car,
3 is frequently admitted under Rule 404(b) as proof of
4 opportunity or knowledge. Such evidence takes on an
5 incriminating quality only in conjunction with the other
6 evidence in the case, such as the case here. This point, too,
7 goes to the weight, not the admissibility, of the evidence.
8 Teman's counsel is at liberty to argue that possession of check
9 stock is no big deal and should not be treated as such here.

10 The Court therefore grants the government's motion to
11 receive the check stock seized from Teman's office on July 3,
12 2019, provided that the check stock is properly authenticated
13 at trial as having been seen there.

14 The Court does, however, request letters from counsel
15 as to a proper limiting instruction regarding the purposes for
16 which the jury may and may not consider the check stock seized
17 from Teman's office on July 3, 2019. Counsel are to confer
18 promptly on this point and to submit a joint letter by next
19 Wednesday, January 15, setting out what I expect will be their
20 agreement on the text of such an instruction or, failing that,
21 their separate views as to the text of such an instruction.

22 I turn now to Teman's motion in limine to preclude the
23 government from offering Rule 404(b) evidence at trial
24 concerning any matter not included in the government's notice
25 provided to Teman on December 31, 2019.

K1AHTMC

1 As background, on December 31, 2019, the government
2 gave notice of its intent to introduce, under Rule 404(b), the
3 check stock I've just addressed. On January 2, 2020, counsel
4 for Teman emailed government counsel and requested notice of
5 any other Rule 404(b) evidence the government intends to
6 introduce at trial.

7 As noted, Rule 404(b) requires, on request, that a
8 prosecutor offering such evidence give reasonable notice of the
9 general nature of any such evidence and do so before trial --
10 or during trial if the Court, for good cause, excuses lack of
11 pretrial notice. The advisory committee notes to Rule 404(b)
12 state that "no specific time limits are stated in recognition
13 that what constitutes a reasonable request or disclosure will
14 depend largely on the circumstances of each case."

15 In seeking to exclude any as yet unnoticed 404(b)
16 evidence, Teman cites a 2011 decision in which my colleague,
17 Judge Pauley, excluded other act evidence disclosed
18 approximately one month before trial on the ground that the
19 government had failed to provide defendants with reasonable
20 notice. That is *United States v. Daugerdas*, 2011 WL 573587, at
21 page 2 (S.D.N.Y. Feb. 16, 2011). But that case is readily
22 distinguishable. It involves an unusually complicated
23 conspiracy by numerous defendants over the course of nearly a
24 decade to repeatedly commit complex tax fraud, largely through
25 the use of sophisticated fraudulent tax shelters. And prior to

K1AHTMC

1 the ruling cited by Teman, Judge Pauley had warned the
2 government "repeatedly about the need to cabin its proof and to
3 provide advance disclosure of the transactions to be offered at
4 trial." *Id.*, in light of the massive universe of complex
5 business transactions spanning a decade that the defendants
6 otherwise would have had to prepare to defend at trial. Those
7 factors are not present here. It's not clear to the Court that
8 were the government to unearth additional 404(b) evidence,
9 Teman would, to anything like the degree presented in
10 *Daugerdas*, be hamstrung in preparing to meet it.

11 To be sure, the government's December 31, 2019, and
12 January 2, 2020, letters imply that the government does not
13 have any present intention to offer further Rule 404(b)
14 evidence beyond the check stock, but it's axiomatic that the
15 government's investigation is ongoing up to and through trial.
16 It is therefore possible that additional Rule 404(b) evidence
17 will come to light or take on new relevance before or during
18 trial. And Rule 404(b) allows the prosecution to disclose
19 other act evidence even as late as "during trial if the court,
20 for good cause, excuses lack of pretrial notice." Citing the
21 text of Rule 404(b).

22 The Court therefore denies defendant's motion to
23 preclude unnoticed 404(b) evidence categorically as premature.
24 If there is such an application, Teman will be at liberty to
25 seek to bar such evidence as untimely, and the Court would then

K1AHTEMC

1 determine, in the context of a particularized controversy,
2 whether the lack of prior notice was justified by good cause.
3 Without a concrete scenario before it, however, the government
4 cannot make an informed ruling. The Court expects the
5 government to provide prompt notice to defense counsel and the
6 Court of any additional 404(b) evidence, if any, as soon as it
7 develops an intention to offer such, so as to assure that the
8 issue of admissibility is thoughtfully and thoroughly
9 litigated.

10 Next, Teman has moved *in limine* to admit the Federal
11 Reserve Board's Federal Register Notice dated November 21,
12 2005. The notice relates to amendments to the fed's Regulation
13 CC that define "remotely created checks." Teman's position is
14 that the checks at issue in this case were valid "remotely
15 created checks (or RCCs) under the regulation. He seeks to
16 admit the Federal Register Notice as Defense Exhibit A to
17 assist the jury in concluding that that is so.

18 The Court denies the motion to receive the Federal
19 Register Notice for two independent reasons.

20 For one, Defense Exhibit A spectacularly fails the
21 test for admissibility under Rule 403. Under Rule 403, the
22 Court may exclude relevant evidence if its probative value is
23 substantially outweighed by a danger of confusing the issues or
24 misleading the jury. The Federal Register Notice has, at best,
25 limited probative value. The key factual issue the government

K1AHTMC

1 seeks to prove at trial is not whether the checks Teman
2 deposited technically qualify or not as "remotely created
3 checks," that term does not appear in the superseding
4 indictment or, for that matter, the earlier indictment. It is
5 Teman, not the indictment, who seeks to inject the concept of
6 "remotely created checks" into the case. The indictment
7 alleges instead that Teman deposited the checks while
8 pretending to have authorization from the account holders to do
9 so, whereas in fact he had created and negotiated the checks
10 without such permission. The Federal Register Notice does not
11 tend to prove or disprove any fact of consequence to these
12 charges. The notice says nothing about whether the account
13 holders, the alleged -- who along with the banks were alleged
14 victims in this case, authorized the creation and negotiation
15 of the checks, and the notice says nothing whatsoever about
16 Teman's state of mind.

17 The Federal Register Notice is germane only insofar as
18 it might serve to educate the jury about the background fact
19 that there is such a thing as a remotely created check and that
20 the remote creation and presentation of such checks are not
21 itself unlawful acts. There may be value to the jury's being
22 informed of that. An old-fashioned juror may not know about
23 that, but that legal concept can easily be communicated to the
24 jury by other means, in particular by an instruction from the
25 Court, as I will explain in a few moments.

K1AHTMC

1 On the flip side of the Rule 403 balance, the Federal
2 Register Notice would create unimaginable jury confusion. The
3 notice is an 18-page, single-spaced regulatory document. It
4 purports to define the term "remotely created check," and then
5 it discusses in expansive detail, among other things, the
6 regulation's administrative history. It also sets out in
7 numbing detail the fed's section-by-section legal analysis of
8 the regulation. Teman's notion that the search for truth in
9 this case would be furthered by inviting the 12 deliberating
10 jurors to wade through this technical, abstruse, academic, and
11 legalistic discussion in this document regarding RCCs is
12 ill-conceived. Such an exercise would promote extreme
13 confusion. It could easily lead the jury to think, wrongly,
14 that to reach a just verdict they are obliged to grasp the fine
15 points of this ponderous regulatory document. The capacity of
16 this document to produce confusion vastly outweighs any
17 marginal probative value that it might contain.

18 Second, Exhibit A is a legal document. It represents
19 and explains a point of federal law, a federal regulation. The
20 defense admits this in its motion. It notes that the exhibit
21 "remains federal law." I'm citing docket 60 at page 2. As
22 such, for the defense to thrust the Federal Register notice's
23 long text before the jury would be grossly to invade the
24 Court's province as the entity responsible for explicating law
25 for the jury. It is black letter law that "it is not for

K1AHTMC

1 witnesses to instruct the jury as to applicable principles of
2 law, but rather for the judge." See *F.H. Krear and Co. v.*
3 *Nineteen Named Trustees*, 810 F.2d 1250, 1258 (2d Cir. 1987).
4 Teman's proposal to put before the jury the Federal Register
5 Notice, a legal document setting out and explicating in
6 tendentious detail a federal banking regulation, breaches this
7 foundational principle, whether the notice would be
8 authenticated by a witness or stipulation.

9 The Court therefore, under Rule 403, denies Teman's
10 motion to admit Defense Exhibit A.

11 However, the Court can imagine a circumstance in which
12 there would be good reason to educate the jury about the
13 central point that the defense presumably seeks to extract from
14 the Federal Reserve Notice, to wit, that a remotely created
15 check, created by a payee with the authorization of the payor
16 is a recognized and lawful instrument. The Court's present
17 instinct is that the best and proper way to convey this point
18 to the jury is by means of a brief instruction from the Court
19 to be given at an appropriate point during the trial. The
20 Court does not rule out, however, that an alternative
21 acceptable way to educate the jury about this background fact
22 would be by means of a brief stipulation. The Court directs
23 counsel to meet and confer forthwith on this issue with an eye
24 towards agreeing on the text of a jury instruction and/or a
25 joint stipulation.

K1AHTMC

1 The Court directs the parties to submit by the close
2 of business Wednesday, January 15, a joint letter containing a
3 proposed jury instruction on this topic. If the parties cannot
4 agree on the terms of such a jury instruction, the letter is to
5 contain the parties' respective proposed instructions. Should
6 the parties agree on a factual stipulation to convey the
7 necessary information, the letter is to include that too.

8 The Court next addresses Teman's motion to exclude an
9 anguished typewritten note that Teman wrote to, *inter alia*, the
10 United States Attorney's Office. The note, which expresses
11 rage at numerous persons, was the subject of a telephone call
12 among the Court, counsel, and Teman on December 12, 2019, the
13 transcript of which the Court has ordered sealed. Teman argues
14 that the note is irrelevant and/or that any probative value it
15 has is outweighed by countervailing factors under Rule 403,
16 including the risk of unfair prejudice and confusion. The
17 government asks the Court to reserve ruling -- reserve on this
18 issue pending trial.

19 At this juncture, the Court is prepared only to say
20 that the vast majority of the note is plainly both irrelevant
21 and unfairly prejudicial. However, the government is correct
22 to observe that at points in the note Teman does address facts
23 and circumstances potentially relevant to the charges in this
24 case. These include reference to persons whose checks he is
25 alleged to have deposited without their authorization. Under

K1AHTMC

1 these circumstances, the proper course is for the Court to
2 reserve judgment on Teman's motion, because it is conceivable
3 that a snippet or snippets within the letter could be properly
4 admitted or used during cross-examination of Teman, should he
5 testify. For avoidance of doubt, however, the government is
6 not to attempt to use any part of the note in any way without
7 the explicit prior approval of the Court. Should the
8 government determine that it wishes to pursue use of any
9 portion of the note for any purpose at trial, it is to notify
10 the Court and the defense forthwith, outside the presence of
11 the jury.

12 Next, I will address Teman's motion in limine to
13 preclude testimony from a person whom Teman depicts as a
14 government expert witness. The witness in question is Bank of
15 America vice president and senior investigator Karen
16 Finocchiaro. On January 6, 2020, the government gave notice to
17 the defense that it intended to call Finocchiaro to testify
18 about Bank of America's charge-back processes, as well as
19 information related to some of Teman's accounts at the bank.
20 Docket 61-1 at 1. As described by the government, a
21 charge-back is a process that occurs when a bank, having sent
22 money to another entity, seeks to have that money returned
23 because the bank suspects a fraudulent transaction. See docket
24 54 at 2. After the charge-back is initiated, the Federal
25 Reserve automatically transfers the money from the receiving

K1AHTMC

1 entity back to the original bank. Id. The government expects
2 Finocchiaro to testify about Bank of America's procedures for
3 initiating and completing a charge-back and for responding to
4 charge-back requests from other banks. Docket 61-1 at 1.

5 Teman seeks to preclude Finocchiaro's testimony,
6 arguing that she is an expert and that the government failed to
7 provide the notice required for expert witnesses under Federal
8 Rule of Criminal Procedure 16(a)(1)(G). The government
9 responds that Finocchiaro's testimony is not that of an expert
10 and that it has no intention to elicit expert testimony from
11 her. It depicts her testimony as that of a lay fact witness
12 describing the operations of a component of her workplace. It
13 states that it provided notice to the defense about the content
14 of Finocchiaro's testimony "in an abundance of caution."
15 Docket 61-1. At the most, Finocchiaro -- the government argues
16 Finocchiaro's testimony could be categorized as lay opinion
17 testimony.

18 Under Federal Rule of Evidence 602, a witness' factual
19 testimony is admissible as long as the witness has personal
20 knowledge, subject, of course, to other rules like Rule 403.
21 See *United States v. Cuti*, 720 F.3d 453, 457 (2d Cir. 2013).
22 Opinion testimony of a lay witness is also admissible, but it
23 is limited under Rule 701 to opinions that are (1) rationally
24 based on the witness' perception; (2) helpful to understanding
25 the witness' testimony or a fact at issue; and (3) not based on

K1AHTMC

1 scientific, technical, or other specialized knowledge. Expert
2 witnesses must meet additional requirements for their opinion
3 testimony to be admissible. Under Rule 702, such witnesses
4 must be qualified as a result of their knowledge, skill,
5 experience, training, or education, and their opinions must be
6 (1) helpful to the jury in understanding evidence or
7 determining a fact at issue, (2) be based on sufficient facts
8 or data, (3) be the product of reliable principles and methods,
9 and (4) reliably apply the principles and methods to the facts
10 of the case at hand. In short, expert opinion testimony must
11 be both relevant and reliable. See *Daubert v. Merrill Dow*
12 *Pharmaceuticals*, 509 U.S. 579, 590-91 (1993).

13 The first-order question here is whether Finocchiaro
14 is a fact witness or an opinion witness. Based on the
15 government's proffer of her anticipated testimony, she is
16 characterized properly as a fact witness. The government has
17 represented only that Finocchiaro will testify as to Bank of
18 America's charge-back processes and procedures, and while the
19 government is not explicit on this point, the Court assumes
20 that her personal knowledge of these procedures comes from her
21 experience as a Bank of America senior investigator. Assuming
22 that to be so, her account of the charge-back procedures at her
23 employer constitutes fact testimony from a fact witness. The
24 government has not provided any opinion that she would offer
25 about these procedures.

K1AHTMC

1 The Second Circuit's decision in *United States v.*
2 *Marsh*, 568 F.App'x 15 (2d Cir. 2014), is apposite authority on
3 this point. There, a law enforcement agent who was trained in
4 retrieving text messages and data from cell phones testified in
5 a criminal trial during which he explained his training,
6 described how he extracted messages from phones in that case,
7 and conveyed the contents of the extracted messages. *Id.* At
8 17. The Second Circuit rejected a challenge that the agent's
9 testimony was improper expert opinion testimony from a
10 nonexpert. It explained that the agent "did not purport to
11 render an opinion based on the application of specialized
12 knowledge to a particular set of facts." *Id.* The same is true
13 here. The government's proffer does not foreshadow any opinion
14 testimony based on application of specialized knowledge to
15 facts.

16 Accordingly, assuming the government lays the proper
17 foundation as to why Finocchiaro has personal knowledge of the
18 matters about which she will testify, her testimony as
19 proffered is admissible fact testimony of a lay witness.
20 Teman's motion to exclude such testimony is therefore denied.

21 For avoidance of doubt, this ruling does not authorize
22 and should not embolden the government to elicit expert
23 testimony from Finocchiaro. The Court suspects that she will
24 testify solely based on personal knowledge about relevant
25 practices and procedures at her employer, Bank of America.

K1AHTMC

1 Finally, I will turn to the government's most recent
2 motion, which asks the Court to preclude expert opinion
3 testimony that Teman proposes to offer. Teman's proposed
4 expert is J. Benjamin Davis. Davis is a lawyer whose practice
5 focuses on the financial services industry and who, according
6 to Teman, has had extensive experience with check negotiation
7 issues. See docket 74-1 at 1. On January 5, 2020, Teman gave
8 the government notice of Davis' anticipated testimony. See Id.
9 Teman states that Davis' testimony would include, inter alia,
10 descriptions of what constitutes a "remotely created check" and
11 what constitutes a "counterfeit check" and his opinions that
12 the checks were "valid RCC" and thus not counterfeit. See Id.
13 At 2-4.

14 The government seeks to preclude Davis' testimony for
15 three reasons: First, that it is irrelevant and will not be
16 helpful to the jury; second, that it improperly intrudes on the
17 province of the Court to give legal instruction to the jury;
18 and third, that his opinions are not the product of reliable
19 principles and methods, as required under Rule 702. Teman
20 disagrees on all fronts.

21 I will first address Davis' testimony related to RCCs,
22 followed by his testimony related to counterfeit checks.

23 First, as to whether Teman's checks constitute valid
24 RCCs, the Court will exclude this testimony. Davis' testimony
25 about RCCs is simply irrelevant. This issue mirrors the issue

K1AHTMC

1 raised by the Federal Register Notice discussed earlier, and
2 which I am also excluding. As I reviewed in connection with
3 that notice, this case does not concern the technical
4 regulatory question of whether the checks meet the Federal
5 Reserve Board's definition of a valid RCC, as interpreted by
6 Davis or otherwise. This is a criminal case, and the issue on
7 Counts One through Four is whether the government has
8 established beyond a reasonable doubt that Teman is guilty of
9 bank fraud or wire fraud. On those counts, the government
10 alleges that Teman's fraudulent scheme consisted of
11 representing to the bank or banks at which he deposited the
12 checks that he had authorization from the owner of the account
13 on which the checks purported to be drawn to create those
14 checks and to deposit them into his own accounts. The
15 indictment alleges that Teman, in fact, lacked such
16 authorization. And as to Teman's fraudulent intent, the
17 indictment alleges that Teman acted with intent to defraud when
18 he pretended to have such authorization.

19 Davis' testimony about technical compliance with RCC
20 regulations has no bearing on either the act or the intent
21 requirement of these criminal statutes. If Teman had the
22 customer's authorization to create and deposit the checks, it
23 does not matter whether he did or did not technically comply
24 with the Federal Reserve requirements for an RCC.
25 Contrariwise, if Teman otherwise complied with the technical

K1AHTMC

1 requirements for an RCC but did not have the customer's
2 authorization to create and deposit into his account a check
3 drawn on the customer's account, and yet intended to do so and
4 did so with the intent to defraud, no amount of compliance with
5 other technical regulatory specifications will serve as a
6 defense. Davis is not a fact witness. He is thus unqualified
7 and incompetent to discuss whether Teman's customers authorized
8 the checks in question, whether Teman knew or did not know
9 about such authorization or lack of authorization, and what
10 Teman's state of mind was when he negotiated the checks.
11 Davis' discussions of whether the checks are "valid" in some
12 technical sense does not bear on any issue at hand in this
13 criminal trial. Further, on the other side of the Rule 403
14 balance, Davis' commentary on these points, like the Federal
15 Reserve Notice, would serve to confuse the jury as to what the
16 issues they must decide are.

17 Finally, any testimony in this area by lawyer Davis
18 would invade the Court's province to instruct the jury as to
19 the law. As I have discussed with regard to the Federal
20 Reserve Notice, to the extent there is a value in explaining to
21 the jury that checks can lawfully be remotely created and
22 negotiated, the Court is open to doing so through an
23 instruction, and I've invited the parties to propose such an
24 instruction to the Court by Wednesday, January 15.

25 Second, as to whether Teman's checks qualify by some

K1AHTMC

1 technical standard as "counterfeit," Davis' testimony is also
2 irrelevant. Davis proposes to testify that "a counterfeit
3 check is a check in which all features have been fabricated
4 (i.e., it is not from check stock that originally belonged to
5 the account holder), including the signature of an authorized
6 signer on the account." Docket 74-1 at 2. Davis would then
7 testify that, in his opinion, the checks do not meet this
8 definition and are thus not counterfeit. I will also exclude
9 this testimony. It is not relevant to any issue presented in
10 this criminal case. The allegation here, again, is that Teman
11 falsely represented that he had customer authorization to
12 create and negotiate the checks made out to him. Teman's guilt
13 or innocence here does not turn on whether every last feature
14 of a particular check was fabricated or only some parts.
15 Again, the allegation here is that Teman falsified and falsely
16 represented the fact of the account holder's authorization for
17 Teman to create and negotiate a check. If so, and if Teman
18 acted with intent to defraud in doing so, subject to the
19 jurisdictional elements, the elements of bank and wire fraud
20 will have been established. That is so even if hypothetically
21 some feature of the check stock was not fabricated by Teman.

22 Here's an illustration. If Teman, for example, had
23 taken preexisting, preprinted but blank checks of the account
24 holder and then, without authorization, filled out these checks
25 to himself and negotiated them, with intent to defraud, and if

K1AHTMC

1 the jurisdictional elements were established, he would be
2 guilty of the offenses charged, notwithstanding the fact that,
3 say, the account holder's preprinted address appeared on the
4 checks. Davis' technical discussion of how the checks align
5 with his understanding of the word "counterfeit" does not
6 assist the jury in evaluating whether any element of bank or
7 wire fraud has been established. As with Davis' proposed
8 testimony about RCCs, his pontificating on this subject, too,
9 would serve only to confuse and distract the jury.

10 I will therefore preclude Davis from testifying on
11 this subject too.

12 There is, however, one caveat. Although this case is
13 not brought under a federal statute regarding counterfeit
14 checks, but instead, as relevant here under the bank and wire
15 fraud statutes, the government in the "to wit" clauses of
16 Counts One through Four of the indictment has chosen to use the
17 adjective "counterfeit" to describe the checks that Teman
18 deposited. From both the indictment and the government's
19 account in its filings in this case in its theory of liability,
20 it seems clear to the Court that, in context, the term
21 "counterfeit" is being used in the "to wit" clauses in the lay
22 sense to describe the fact of checks that were created without
23 the account holder's authorization. Insofar as the checks
24 purported to have been drawn by the account holder to the
25 payees in the sums indicated, but in fact had not been, they

K1AHTMC

1 were "counterfeit." There's no indication, in the indictment
2 or otherwise, that by use of that adjective, the grand jury
3 intended some other technical meaning of counterfeit, such as
4 the one that Davis may have in mind, in which he contends that
5 literally every jot and tittle of the check must have been
6 fabricated by the defendant before it may be called
7 counterfeit.

8 I will, however, confirm with the government that the
9 use of the term "counterfeit" in the "to wit" clause of the
10 indictment was not based on the grand jury's having been
11 presented with a technical definition of the concept of
12 counterfeit along the lines that Davis proposes to use. If it
13 were unexpectedly to turn out that the indictment was returned
14 pursuant to such an instruction, I would then, of course, have
15 to reassess this ruling.

16 I'll also say this to defense counsel. I do not
17 expect this case to take an unexpected turn that would make
18 expert testimony in any of these technical points relevant.
19 But trials sometimes take unexpected courses. You are at
20 liberty, outside the presence of the jury, to make the argument
21 that some development at trial has created a justification for
22 expert testimony along the lines proffered.

23 And that concludes my ruling.

24 So, Mr. Bhatia, let's just go to that last point. I'm
25 not asking you to disclose the transcript of the grand jury,

K1AHTMC

1 but I am trying to understand what was meant by the term
2 "counterfeit." Was the grand jury given a definition of the
3 term "counterfeit"?

4 MR. BHATIA: No, your Honor. I think what you
5 described in your ruling --

6 THE COURT: Speak into the mic a little bit more.

7 MR. BHATIA: When you described in your ruling the use
8 of counterfeit in the lay sense as sort of non-genuine or
9 non-authorized, I think that was the intended --

10 THE COURT: That was theory presented to the jury?

11 MR. BHATIA: That's right.

12 THE COURT: That's certainly consistent with the text
13 of the indictment in this case.

14 All right. That concludes, then, my ruling. We'll
15 take a ten-minute recess, and when we come back we'll continue.

16 (Recess)

17 THE COURT: Continuing on with the issues before us,
18 trial length, particularly given the rulings that I've made,
19 that may inform something about the length of the trial.

20 Government, do you have an estimate of the number --
21 how long the trial will be?

22 MR. BHATIA: Your Honor, I think in the three- to
23 four-day range, that will include cross.

24 THE COURT: When you make that estimate, are you
25 taking into account jury selection and jury arguments?

K1AHTMC

1 MR. BHATIA: I think the government can close by the
2 end of the fourth day.

3 THE COURT: What assumption, if any, are you making
4 about a defense case when you make that estimate?

5 MR. BHATIA: That's just based on the government's
6 case.

7 THE COURT: That assumes no defense case?

8 MR. BHATIA: Yes.

9 THE COURT: Three to four days.

10 Defense, anything you want to share? I'm just trying
11 to think about this from a planning perspective, including what
12 to say to the venire.

13 MR. GELFAND: Obviously, without waiving any rights,
14 your Honor, I would anticipate an approximately one-day defense
15 case, if any.

16 THE COURT: So that's helpful. Putting all that
17 together, we're going to be starting on Tuesday, January 21. I
18 will sit that Friday. So that gives us four days the first
19 week. I suppose what I ought to say is the parties expect the
20 trial to be over between one and two weeks. Does that sound
21 like a fair estimate? Probably erring on the lower side, but
22 I'll find words to the venire along those lines. That sound
23 right?

24 MR. GELFAND: With us, your Honor.

25 MR. BHATIA: That sounds appropriate.

K1AHTMC

1 THE COURT: All right. I don't think this will
2 matter, but I'm wide open the last week, save that if this is
3 still ongoing on Thursday, the 30th, I have a long-scheduled
4 speaking engagement in Midtown which would knock out an extra
5 long lunch period, but otherwise I have no blocks on my time,
6 at least through that day.

7 Mr. Smallman points out that I have a multi-defendant
8 case on Wednesday morning at 9 o'clock, but based on the
9 estimates I'm getting, it sounds as if there's a good chance
10 the jury will be out by then deliberating, in which case we can
11 accommodate both. We'll see. In any event, my chambers will
12 take stock of how this case is going with you late in the first
13 week and decide what, if any, implications it has for this
14 conference, but this takes precedence.

15 All right. As to my daily schedule, I expect counsel
16 and the defendant to be in their seats and ready to go at
17 9:00 a.m. sharp each day of the trial. Set aside for a moment
18 the very first day of the trial where the same will apply, the
19 ordinary schedule that I use when we have a jury is as follows:
20 Counsel are expected to be in their seats at 9:00 a.m. I tell
21 the jury they need to be ready to go and ready to be brought
22 out at 9:30, but we invite them to come as early as 8:45 when
23 we have breakfast available to them in the jury room, and that
24 often has the result of getting jurors here early.

25 Between 9:00 and 9:30 we use the time to work through

K1AHTMC

1 issues that may come up during the trial day or, for that
2 matter, later in the trial. But at 9:30, as soon as the last
3 juror has arrived, we bring the jury out, and we sit till
4 5:00 p.m. I try to sit a full day to project to the jury that
5 we're respecting their time. We'll take a break in midmorning
6 and midafternoon, a comfort break, of ten to 15 minutes, and
7 we'll take a lunch break in the middle of the day. But
8 otherwise, we're going to work relentlessly from 9:30 to 5:00
9 with the jury.

10 After 5:00 p.m., you should expect to be here to the
11 extent that there may be issues for the next day or for a jury
12 charge, or whatnot, that I need to take up with you. While, if
13 necessary, of course, I will take sidebars, I prefer to avoid
14 doing so when I -- as much as possible. I prefer instead to
15 take up issues with you at the start of the day, at the end of
16 the day, and so I very much value getting letters or getting
17 previews from counsel at those points, either before the day
18 starts or afterwards, so that I can ideally resolve issues, not
19 in the crucible at the sidebar but with a little more
20 forethought and deliberation. It's already clear to me from
21 the extensive motion in limine briefing that both sides have
22 that sensibility. I was glad to see it, but I want to
23 encourage you to keep doing that, to keep raising issues so I
24 can have an opportunity to think on them and not be forced to
25 think fast. Avoiding sidebars also keeps us moving quickly.

K1AHTMC

1 Juries hate it when we take long breaks doing that. I will if
2 necessary, but I'd like to minimize it.

3 On January 21 we will start at 9:00 a.m. Fair
4 warning, though, is that it will take some time to get us a
5 panel in all likelihood. The jury will need to -- the video
6 will need to get -- assuming the people who are sitting are
7 there for their first week, will need to get trained on jury
8 service. They'll need to watch the video, and they'll need to
9 be brought across the street. And I have it on good authority
10 that there's a high-profile case that might take precedence
11 over ours in terms of completing questionnaires, and whatnot.
12 So we will get started, but there might be some need for some
13 sort of break. I just don't know. Just fair warning. In any
14 event, because I won't see you between now and the 21st,
15 there's every chance a variety of housekeeping issues will pop
16 up, so be in your seats at 9:00 a.m. on the 21st.

17 I'm about to turn to voir dire. Any questions about
18 the schedule, though?

19 MR. BHATIA: No, your Honor.

20 MR. GELFAND: No, your Honor. One question, just
21 housekeeping question. To the extent that any evidentiary
22 objections do require more detail, would the Court like us to
23 request sidebar or just make the objection?

24 THE COURT: Try to make the objection in the first
25 instance just by reference to the --

K1AHTMC

1 MR. GELFAND: Rules.

2 THE COURT: -- the rule of evidence, and I may prompt
3 you for elaboration if I need help. If there's something
4 fundamental, I'm open to your requesting a sidebar, but choose
5 wisely.

6 MR. GELFAND: Appreciate it. Thank you.

7 THE COURT: Very good. I should say -- this is
8 particularly relevant for the government since you go first --
9 you need to always have your next witness handy. The threat I
10 always make is if it's 4:45 and the last witness is done and
11 you don't have somebody else in the witness room, you'll be
12 taken as resting. So be sure there's always someone on the
13 on-deck circle.

14 MR. BHATIA: Understood.

15 THE COURT: Let's turn to voir dire. You've given me
16 the length of the trial that I will use, and I'll find words to
17 capture that. Given the length of the trial, I think we're OK
18 just going with two alternates. Anyone think otherwise? Seems
19 like a short enough trial that I don't need more.

20 MR. DIRUZZO: That's fine, Judge.

21 MR. BHATIA: That's fine.

22 THE COURT: All right. So as to jury selection -- and
23 Mr. Imperatore knows this, but for everyone's benefit -- I use
24 the struck panel method. That means what I will be doing is
25 having Mr. Smallman, in the first instance, identify 32

K1AHTMC

1 prospective jurors numbered 1 through 32, and they will be --
2 the first eight will be in the first row of the jury box, nine
3 through 16 will be in the second row, and then 17 through 32
4 will be in the first few rows of the pews out here. Each juror
5 will retain their number. So if Juror 17 gets removed, the
6 successor juror will take the spot of No. 17 as opposed to
7 re-calibrating the rows. That makes your housekeeping and your
8 paperwork in mind easier.

9 I will direct a lengthy series of questions at them
10 aimed at determining whether there is any valid basis for a
11 for-cause challenge. And eventually, at the end of that
12 process, we'll have 32 people who have cleared for-cause
13 challenges. At that point we have a short one-page
14 biographical questionnaire -- I use the same one in every
15 case -- that elicits information about employment, family
16 members' employment, education, hobbies, reading habits, and so
17 forth. The final question, which counsel constantly tell me is
18 in some respects more revealing than many of the ones that come
19 before, asks if there's a famous person the juror admires and
20 briefly why. Sometimes that smokes out latent interests,
21 biases, and so forth.

22 In any event, you'll have the benefit of all that
23 information. I will then give you a very short break, but a
24 very short one, to determine how you intend to use your
25 strikes, and I'll then bring counsel into the robing room for

K1AHTMC

1 the purpose of exercising your strikes.

2 This is important. This just gets to the mechanics.
3 Under the rules, with respect to the jury as opposed to
4 alternates, the defense has ten strikes and the government has
5 six. Those initial strikes are all to be directed to Nos. 1
6 through 28 of the 32. Those are the people eligible to be our
7 regular jurors. We will go, as per usual, in six rounds. The
8 first four of which the defense will have two strikes and then
9 the government will have one, and the last two that each side
10 will have one strike. The 12 People that remain will be our
11 jurors.

12 You need not go in sequence. You can strike No. 27
13 and then in the next round strike No. 1. There's no sequencing
14 requirement here. But if you waive a strike in a particular
15 round, you can't use it again. You can go back and use other
16 ones, but you can't use that one again. So, defense, in round
17 two, if you say we waive our two strikes, you can't get those
18 back even though your round three strikes remain.

19 You should not, though, direct those first strikes,
20 ten the defense, six for the government, at the alternate
21 candidates, No. 29 through 32. At the end of the exercise of
22 the strikes, as I said, the first 12 will be our jurors, if
23 somebody has waived a strike, the effect of that is, in effect,
24 to strike No. 28. So after we have figured out who the 12
25 jurors are, each of you will then have one strike to be used as

K1AHTMC

1 against Nos. 29 through 32, and the two that survive that
2 process, or the first two that do, will be our alternates.

3 As is commonly the case in federal court, but just to
4 make the point clear, the Court alone does the questioning of
5 the jurors. There are no counsel questions.

6 Any questions about the mechanics of voir dire?

7 MR. BHATIA: No, your Honor.

8 MR. DIRUZZO: No, your Honor.

9 THE COURT: Who will be at each table during the
10 trial? Will it be the three people at each table who are here
11 now?

12 MR. BHATIA: From the government, yes, your Honor.
13 One moment.

14 (Counsel confer)

15 MR. BHATIA: Your Honor, we also have a case agent.
16 We have not made a decision yet about whether he will testify
17 as a witness at trial, but we may request that he sit at
18 counsel table.

19 THE COURT: I think, under the rule, he is
20 permitted to sit here whether or not he is -- I think it's
21 Rule 615. He's allowed to sit at the table as the embodiment
22 of the government's case, the government's corporate
23 representative. Just let Mr. Smallman -- or, rather, let my
24 law clerks know beforehand, because they're going to be
25 preparing a script for voir dire, and I need to know who's

K1AHTMC

1 going to be there.

2 MR. BHATIA: We will.

3 MR. GELFAND: It will be --

4 THE COURT: Defense?

5 MR. GELFAND: It will be exactly as you say, your
6 Honor.

7 THE COURT: There's a point in voir dire where one by
8 one I ask you both each of you to rise and look at the jury,
9 look here and at the venire in the back. Listen closely to my
10 command for when you should get up. I don't want all three of
11 you getting up. I want it one by one, and I will choreograph
12 it that way.

13 Please -- and Mr. Smallman points out he will need to
14 know who's here for the appearance sheet, so tell him too.
15 Fair enough.

16 Do not say "hello" to the jury, please. It annoys
17 them to have people sucking up in that sort of a way, and I'm
18 asking you just to simply get up and let them see you. But
19 it's not an opportunity to wish them all well.

20 All right. For voir dire, I will need an alphabetical
21 list of all names that may come up in the case. These are not
22 just witnesses, but names that may come up. What I appreciate
23 is one list of human being names and one list of corporate
24 names, but make those separate and make them alphabetic. You
25 should get rid of the people who are named and present at the

K1AHTMC

1 trial table. There's no need to include the lawyers or
2 Mr. Teman on that list. I'll ask the government to get that to
3 me after consultation with the defense. If you have other
4 names, please just add that.

5 All right. Let me briefly read to you just a very
6 short statement that I intend to give to the venire, as I do in
7 all cases, just so they have a general understanding of what
8 the case is about. I try to make this very stripped down.
9 It's not an opportunity to figure out what all the curlicues
10 are in the case, but really just to smoke out issues of bias in
11 case somebody has had a life experience that looks like this
12 case.

13 This is what I propose to read to the venire. When
14 I'm done reading this to you, I'll ask you if there are any
15 inaccuracies or any necessary edits:

16 "So you can understand the reason for the questions I
17 will be asking you shortly, I will now tell you briefly about
18 this case. I want you to understand that nothing I say today
19 regarding the description of the case is evidence. The
20 evidence that you will consider, if selected as a juror, will
21 come only from the trial testimony of witnesses, from the
22 reading of" -- sorry -- "from the trial testimony of witnesses
23 and from exhibits that are entered into evidence.

24 "As I have explained, this is a criminal case. It is
25 entitled United States of America v. Ari Teman. Mr. Teman has

K1AHTMC

1 been charged with committing federal crimes in an indictment
2 returned by a grand jury sitting in this district. I will now
3 summarize the charges in this case in order to determine
4 whether anything about this case may make it inappropriate for
5 any of you to sit on the jury.

6 "In summary, the indictment charges Mr. Teman with
7 committing fraud by depositing into bank accounts that he
8 controlled checks drawn on other people's accounts but which
9 Mr. Teman was not authorized to deposit. It alleges that
10 Mr. Teman did this with two checks in approximately March 2019.
11 It alleges that Mr. Teman did this again between April and
12 June 2019, this time with 27 checks. In each instance, the
13 indictment alleges that Mr. Teman later used money that he had
14 and deposited for his personal benefit.

15 "In connection with each set of deposits, the
16 indictment charges Mr. Teman with three crimes: Bank fraud,
17 wire fraud, and aggravated identity theft. Mr. Teman denies
18 these charges.

19 "Now, let me stress that an indictment is not
20 evidence. It simply contains the charges against the
21 defendant, and no inference may be drawn against the defendant
22 from the existence of the indictment. You must always keep in
23 mind that the defendant is presumed innocent, that he has
24 entered a plea of not guilty to the charges against him, and
25 that the government must prove the charges in the indictment

K1AHTMC

1 beyond a reasonable doubt."

2 So, counsel, tell me, any issues with that summary?

3 MR. DIRUZZO: Judge, I would just ask that there --
4 there are two things: One, the description of evidence, I
5 think it also needs to have an inclusion for stipulation of the
6 parties.

7 THE COURT: From trial testimony stipulations of the
8 parties?

9 MR. DIRUZZO: And documentary evidence.

10 THE COURT: It says exhibits, so that's fine.
11 Stipulation, good catch, yes.

12 MR. DIRUZZO: Then I believe you said Mr. Teman
13 deposited checks belonging to people, and I believe the alleged
14 victims are all entities.

15 THE COURT: OK. In other words, I should change
16 "people" to "companies" or "entities"? What's the right word?

17 MR. DIRUZZO: Companies, businesses.

18 MR. GELFAND: Companies or businesses. I don't know.
19 There's one other thing, your Honor, I may have misheard.

20 THE COURT: Sorry, one second. It says: "In summary,
21 the indictment charges Mr. Teman with committing fraud by
22 depositing into bank accounts that he controlled checks drawn
23 on other people's accounts ..." and you want "people" changed
24 to "businesses." I'm not sure, in the context here, people is
25 a shorthand for meaning other than Mr. Teman. But what would

K1AHTMC

1 you propose I change?

2 MR. GELFAND: Companies.

3 MR. DIRUZZO: Companies.

4 THE COURT: On the accounts of -- I just want to make
5 sure it's clear these are companies, of course, that are not
6 his.

7 MR. DIRUZZO: Yes.

8 MR. GELFAND: "Customers of Mr. Teman's company"?

9 THE COURT: The business relationship, that's for you
10 all to litigate.

11 Government, what's your view?

12 MR. BHATIA: Your Honor, I think it may be fair to say
13 "on the accounts of others" to keep it most neutral, "checks of
14 others."

15 THE COURT: "On the accounts of others," that's fine.
16 I can say "checks drawn on the accounts of others." All right.
17 I'm not going to commit that I will use that language, but
18 that's certainly adequate. I may play with it a bit, but I
19 take the defense point not to use the word "people" when it's
20 actually corporate accounts.

21 MR. GELFAND: On an unrelated note, I might have
22 misheard this, your Honor, but the aggravated identity theft
23 counts are actually only associated with the March checks, and
24 I think the summary might have conflated that they were
25 associated with the --

K1AHTMC

1 THE COURT: Yes, right.

2 MR. GELFAND: I don't remember the exact language, but
3 I just wanted to flag that for the Court.

4 THE COURT: Right. I have written "in connection with
5 each set of deposits, it charges him with three crimes," and
6 that's not correct. Why don't I say "in connection with these
7 deposits," that way it doesn't specify how the aggravated
8 identity --

9 MR. GELFAND: That's fine, your Honor.

10 THE COURT: Very good. With three -- it's irrelevant
11 to the jury in jury selection whether there are multiple
12 instances of separate crimes. I think it's enough to say three
13 crimes or sets of crimes, bank fraud, wire fraud, and
14 aggravated identity theft.

15 Are we OK with the description as edited?

16 MR. BHATIA: Yes, your Honor, I think with the change
17 for aggravated identity theft, it all sounds good.

18 THE COURT: Good.

19 MR. DIRUZZO: We're fine, Judge.

20 THE COURT: Thank you, counsel.

21 All right. Next issue is courtroom technology. I
22 know you're going to be meeting with Mr. Smallman for a
23 walk-through, but just so I understand, government, you're
24 going to be starting off. How are you going to be -- how
25 voluminous are the exhibits in this case, and how do you intend

K1AHTMC

1 to make them known to the jury?

2 MR. BHATIA: Your Honor, I don't think the exhibits
3 are too voluminous in this case. What do you mean by how --

4 THE COURT: Are you going to use the ELMO? Are you
5 going to hand out hard copies? Are you going to --

6 MR. BHATIA: I think we're intending to use the
7 courtroom --

8 THE COURT: Computer system?

9 MR. BHATIA: -- computer system.

10 THE COURT: Not the ELMO at the podium?

11 MR. BHATIA: That's right.

12 THE COURT: All the more important, because it's a
13 balky courtroom and important that -- I guess this is probably
14 more for Mr. Magliocco than anyone in the courtroom -- you be
15 ready for prime time, so work with Mr. Smallman and be ready
16 beforehand.

17 MR. BHATIA: Yes.

18 THE COURT: Mr. Smallman points out that Mr. Magliocco
19 has ably assisted me, I think, in the Rivera trial? Rivera --
20 Polanco?

21 MR. MAGLIOCCO: Polanco trial.

22 THE COURT: Quite right. Defense, what about you?
23 What are your thoughts as to technology?

24 MR. GELFAND: Your Honor, our instinct, as of now, is
25 to rely primarily on the ELMO, as far as documentary exhibits.

K1AHTMC

1 We also are going to make sure that we're fully situated with
2 the court's AV equipment so we can electronically display, as
3 well, using common software.

4 THE COURT: The issue would be for you, for example,
5 if there was something produced in discovery that you want to
6 show to the witness, just make sure that you have tested your
7 ability to use that. The jurors can't stand fumbling around
8 and long delays. So you will benefit as much as anyone by your
9 being crisp in the use of that.

10 MR. GELFAND: Absolutely, your Honor.

11 THE COURT: Very good. Anything else on courtroom
12 technology?

13 MR. BHATIA: Nothing, your Honor.

14 THE COURT: OK. Jury addresses. We have a -- it's
15 not present here right now, but we have a portable podium that
16 will be before the jury. Not that, but a portable one. It
17 will be right in front of the jury box. The important thing is
18 that it does not contain a microphone, so Mr. Smallman has a
19 handheld wireless mic which we usually lie down on the bar
20 before the jury right next to the podium, and that will pick up
21 everyone's voice. What it means is, though, you shouldn't be
22 straying far from the podium because you'll lose the mic. So
23 just as an FYI.

24 With respect to questioning of witnesses, you're to
25 question the witnesses from the podium back here. Please,

K1AHTMC

1 except for presenting documents to the witness, you shouldn't
2 be questioning from the well of the courtroom. It's an
3 ancient, old courtroom. If you're far from the mic, it's hard
4 to be heard. You'll surely hear me from time to time asking
5 people to keep their voices up.

6 All right. 3,500 material. Has the government
7 provided 3,500 to the defense; if so, when does it intend to do
8 so?

9 MR. BHATIA: Your Honor, we have not produced 3,500,
10 but we plan to do it in the first half of next week.

11 THE COURT: All right. I can't order you to do it on
12 a particular date, but can you commit to a specific date so the
13 defense knows?

14 MR. BHATIA: We can produce it by Wednesday of next
15 week.

16 THE COURT: How voluminous is the 3,500 material?

17 MR. BHATIA: I don't expect it to be very voluminous,
18 certainly not beyond what has already been produced as
19 discovery.

20 THE COURT: Not beyond what?

21 MR. BHATIA: Not beyond what has been produced in
22 discovery.

23 THE COURT: I don't know what that means.

24 MR. BHATIA: Some of the 3,500 has already been
25 produced as Rule 16 discovery.

K1AHTMC

1 THE COURT: Right.

2 MR. BHATIA: It may not be new. I don't expect it to
3 be voluminous, though.

4 THE COURT: All right. Please, when you get the
5 binders -- or binder or binders, please get two sets of that to
6 my chambers as well. I will often flip through it beforehand
7 just to get a sense of what's coming, and it's important for me
8 and my law clerk each to have a set of that.

9 MR. BHATIA: We will.

10 THE COURT: All right. Government, also, just in the
11 interest of enabling the defense to prepare, it is my practice
12 to ask you each day who the next witnesses are likely to be.
13 Obviously, in the event there's a good reason, you may need to
14 shake it up, but nobody benefits by mystification. So I will
15 expect you to give the defense a sense of who your next
16 witnesses are at the end of each day.

17 MR. BHATIA: Understood.

18 THE COURT: Obviously, you can do so beforehand,
19 before even that, all the better. That also allows me to
20 prepare for the next day's testimony.

21 To the extent that you're updating 3,500 material, per
22 usual, I expect that I would get hand delivered to us whatever
23 additional three-hole punched supplements there are as they get
24 generated. Usually counsel tend to give it to my chambers at
25 the end of the court day or at the beginning of the next court

K1AHTMC

1 day.

2 Government, I would welcome a pair of exhibit binders
3 as well. Obviously, you're at liberty to update those. I
4 assume that you can get those to me the Friday before trial,
5 the 17th.

6 MR. BHATIA: We will.

7 THE COURT: And, obviously, the same to the defense.

8 All right. I have benefited by the government's
9 preparation of an exhibit list and your updating it on a daily
10 basis to annotate what has been received in evidence, that way
11 it makes sure that both tables in the court are on the same
12 page and have no doubt of what's been received in evidence. I
13 ask you to kindly prepare that. I'm rather sure we did that in
14 the Polanco trial.

15 Verdict form. This is about as straightforward as it
16 gets, but, defense, do you have any issues with -- I may make
17 some nonsubstantive changes, but any issues with the verdict
18 form as provided by the government?

19 MR. GELFAND: Not at first glance. The only question,
20 depending on what ultimately turns on disputes at trial, is
21 whether we would request any special interrogatories.

22 THE COURT: Right. There's no sentencing factor here.

23 MR. GELFAND: Correct.

24 THE COURT: What would the purpose be of a special
25 interrogatory?

K1AHTMC

1 MR. GELFAND: I don't anticipate there will be any. I
2 just wanted to get a carve-out theoretical exception.

3 THE COURT: If you come up with some issue with the
4 verdict form, let me know as soon as possible.

5 MR. GELFAND: Absolutely.

6 THE COURT: Almost done here. Plea offers. This
7 being our last conference, I need to put on the table and raise
8 whether any plea offers have been made to the defendant and to
9 confirm that they were communicated to him. For the benefit,
10 in particular, of Mr. Teman, the reason courts do this is not
11 to pry but, rather, because from time to time one gets
12 post-trial complaints by defendants that plea offers were never
13 communicated to them. Sometimes these happen years after the
14 fact. It's important that a Court inquire at this stage
15 whether there was any such thing, just so that there's a clear
16 understanding from everybody about what happened as to the plea
17 process.

18 Government, can you put on the table what, if any,
19 plea offers have been made in this case.

20 MR. BHATIA: Your Honor, no formal plea offers have
21 been made in this case.

22 THE COURT: I take it there must have been some
23 informal discussion, or not even that?

24 MR. BHATIA: We have had informal discussion at
25 different stages of the case, but there hasn't been a formal

K1AHTMC

1 offer.

2 THE COURT: All right. Mr. Gelfand, is that correct?

3 MR. GELFAND: Yes, your Honor, it is. What I would
4 note, for the record, is that Mr. Teman has consistently
5 expressed his intention to proceed to trial and his lack of
6 interest in any sort of plea. As a practical matter,
7 government counsel being government counsel and defense counsel
8 being defense counsel, we have engaged in just some very
9 general dialogue over the course of this case, nothing that has
10 materialized in an offer, either by the government or a request
11 by the defense.

12 THE COURT: I'm going to ask Mr. Teman just to confirm
13 that's his understanding.

14 Mr. Teman, is it correct that you are unaware of any
15 plea offer, any formal plea offer, having been made to you?

16 THE DEFENDANT: Correct, your Honor.

17 THE COURT: Any counsel believe I need to inquire
18 further about this subject?

19 MR. BHATIA: No, your Honor.

20 MR. GELFAND: No, your Honor.

21 THE COURT: All right. There's a final matter
22 relating to the grand jury which I'll take up in a moment, but
23 before that, does anyone have anything else relating to the
24 trial that they want to raise?

25 MR. BHATIA: No, your Honor.

K1AHTMC

1 MR. DIRUZZO: Your Honor, before we get into the grand
2 jury portion, early this morning, earlier this morning, counsel
3 for the government provided us with a letter indicating they
4 have effectively changed the alleged victims for the aggravated
5 identity counts. We view this, given the government's past
6 representations -- and I'm sorry I don't have a copy, but I
7 literally got the email with the letter while we were in the
8 courthouse, your Honor, so I don't have a copy to provide the
9 Court -- but as a result of the government's total change in
10 its position as to who the alleged victims of the agg. ID
11 counts are, we're taking the view that the government now has
12 to have *Brady* information because the government has made
13 representations in the past that are now totally inconsistent.
14 And we believe that, at a minimum, the information and the
15 testimony before the grand jury that resulted in the previous
16 indictment and previous superseding indictment will be *Brady*,
17 some form of *Brady* material.

18 THE COURT: Let's unpack this. Who are you told is
19 the victim of -- is Entity 3, the -- Count Five charges
20 aggravated identity theft for March 2019. It says that Teman
21 deposited a check using the personal identifying information of
22 an individual associated with Entity 3. Who's Entity 3?

23 MR. DIRUZZO: Your Honor, unfortunately, given that it
24 just came to me via email, the only way I'd be able to answer
25 that would be to look on my phone, which I have turned off, and

K1AHTMC

1 I don't want to offend the Court.

2 THE COURT: You're not offending the Court. I'm just
3 trying -- you're telling me there's been a switch, so I'm
4 trying to figure out who it was earlier and who it is now.

5 MR. GELFAND: Your Honor, I think this may help. The
6 government, by letter this morning, indicated that the entity
7 referenced in Count Five is Mercer, whatever the formal name
8 is.

9 THE COURT: Right.

10 MR. GELFAND: And then the entity referenced in Count
11 Six is Coney.

12 THE COURT: Count Six refers to Entity 4.

13 MR. GELFAND: Correct.

14 THE COURT: Spell Coney.

15 MR. GELFAND: Coney, C-o-n-e-y.

16 THE COURT: And those same counts appeared in the
17 preceding indictment, correct?

18 MR. GELFAND: Correct, your Honor.

19 THE COURT: Are you saying that you were told that
20 either Entity 3 or 4 were different than Mercer and Coney,
21 respectively, earlier?

22 MR. GELFAND: No, the entities were not different.
23 What was different -- I can -- just for the Court's benefit, by
24 email dated November 12 of 2019, government counsel,
25 Mr. Gutwillig, in an email to me, cc'ing Mr. DiRuzzo, stated --

K1AHTMC

1 I don't know if the Court's OK with me naming the alleged
2 victims.

3 THE COURT: Sorry?

4 MR. GELFAND: Is the Court OK with me naming the
5 alleged victims?

6 THE COURT: Sure. There is a *Brady* issue here.

7 MR. GELFAND: Stating "the victims are, one, for Count
8 Three, which was the prior enumeration, Peter Rebenwurvel,
9 R-e-b-e-n-w-u-r-v-e-l, and for Count Four, Gina, G-i-n-a, Hom,
10 H-o-m, and then --

11 THE COURT: Meaning that Rebenwurvel was associated
12 with Mercer, and Hom was associated with Coney?

13 MR. GELFAND: Rebenwurvel actually related to how
14 Count Three was charged previously as Coney and Hom was Mercer.

15 THE COURT: I'm confused.

16 MR. GELFAND: Rebenwurvel is associated --

17 THE COURT: Sorry, the original Count Three, is that
18 the current Count Five, or is it the current --

19 MR. GELFAND: The original Count Three is the current
20 Count Six.

21 THE COURT: So the original Count Three --

22 MR. BHATIA: Your Honor, if I might offer some
23 clarity?

24 THE COURT: That would be great.

25 MR. BHATIA: The original Count Three -- sorry, the

K1AHTMC

1 first superseding Count Three is now Count Five. And for Count
2 Three previously and now Count Five, the corporate entity is
3 Coney Realty.

4 THE COURT: Count Three and Five. So what defense
5 counsel said was wrong earlier that Mercer is --

6 MR. BHATIA: I think they just flipped.

7 THE COURT: I'm sorry. You need to speak up.

8 MR. BHATIA: Yes, your Honor. It was incorrect.

9 THE COURT: Let me see if I've got this right. I'm
10 going to ask you, Mr. Gelfand, just to listen closely to what
11 my colloquy with government counsel is. This may clear things
12 up. It may be that it's utterly unnecessary to involve me
13 because there hasn't apparently been a dialogue with counsel,
14 but let's see if we can work this out.

15 Count Five, government counsel, identifies Entity 3.
16 Who is Entity 3?

17 MR. BHATIA: Entity 3 is Five -- well, it's 518
18 West 204th LLC, which is operated by -- I say "operated" in the
19 lay sense -- associated with or operated by Coney Realty.

20 THE COURT: All right. So Count Five, Entity 3, is
21 Coney in the vernacular, and Count Six, Entity 4, is who?

22 MR. BHATIA: It's Crystal Real Estate. It's actually
23 18 Mercer Equity, but it's really sort of operated by Crystal
24 Real Estate.

25 THE COURT: Is there a Mercer involved? So that's

K1AHTMC

1 Mercer in that sense?

2 MR. BHATIA: The corporate entity is 18 Mercer Equity,
3 I think, Inc. Or LLC, and it's operated by Crystal Real Estate.

4 THE COURT: All right. What was the predecessor count
5 to the current Count Five?

6 MR. BHATIA: Count Three.

7 THE COURT: What was the predecessor count to the
8 current Count Six?

9 MR. BHATIA: Count Four.

10 THE COURT: All right. So focusing on the current
11 Count Five where it's this 518 West 204th LLC operated by
12 Coney, was that the same entity that Mr. Gutwillig indicated
13 was the victim of count -- of the earlier Count Three?

14 MR. BHATIA: I can clarify the victim question. The
15 corporate entities for the checks that were drawn were the
16 same.

17 THE COURT: Right.

18 MR. BHATIA: Previously Coney, now Coney.

19 THE COURT: Right.

20 MR. BHATIA: Previously, the government had agreed
21 that the victim of identity theft, the individual, the person,
22 was Peter Rebenwurvel. The government disclosed this morning
23 in a letter providing particulars that the victim -- the
24 victim, persons whose means of identification have been taken,
25 are three individuals: Peter Rebenwurvel -- let me make sure I

K1AHTMC

1 say it right from my letter -- Michael Haas.

2 THE COURT: Michael, spell the last name.

3 MR. BHATIA: H-a-a-s.

4 THE COURT: Right.

5 MR. BHATIA: And Ephraim Nuremberg. Actually, your
6 Honor, I now realize the source of confusion here. In the
7 indictment, what I described was correct. I believe in the
8 bill of particulars today, we flipped the entities. That's the
9 source of confusion.

10 THE COURT: The source of confusion is that your
11 letter today is wrong?

12 MR. BHATIA: The letter flips Count Five and Count
13 Six. We'll give them a new letter.

14 THE COURT: All right. Once you correct your
15 letter --

16 MR. BHATIA: That's right.

17 THE COURT: -- will there be symmetry between your
18 disclosures as to the earlier Count Three and the current Count
19 Five?

20 MR. BHATIA: No.

21 THE COURT: What's changed?

22 MR. BHATIA: Previously the government had agreed with
23 defense counsel -- the government and defense counsel had
24 agreed to file a stipulation providing the particulars. I
25 think we've now had a sense that a letter providing those

K1AHTMC

1 particulars is sufficient. But previously we had agreed that
2 the victim of the identity theft count for Coney was Peter
3 Rebenwurvel.

4 THE COURT: Right.

5 MR. BHATIA: We now believe that the victims were
6 three individuals. So the first one was relating to the first
7 superseding indictment, and as to the second superseding
8 indictment, we're alleging that it's these three individuals.

9 THE COURT: That's all fine and good, but the
10 indictment doesn't say that. Count Five of the superseder uses
11 singular. It says an individual associated with Entity 3. Who
12 did the grand jury -- what was the charge to the grand jury as
13 to who that individual was? We can't have a shifting target.
14 That reflects a charge by the grand jury. That's what the
15 defendant will be tried on. Who's that individual?

16 MR. BHATIA: Your Honor --

17 THE COURT: Can't just say three people if you say "an
18 individual."

19 MR. BHATIA: I just want to tread lightly, knowing
20 that I'm in the domain of the grand jury.

21 THE COURT: But, look, sorry, but the grand jury
22 formulates the charges. The government doesn't add content to
23 and change the charges. And for better or worse, you went to
24 the grand jury and said "an individual." Who is that
25 individual?

K1AHTMC

MR. BHATIA: May I have a moment, your Honor?

THE COURT: Yes.

(Counsel confer)

MR. BHATIA: Thank you, your Honor.

The grand jury was presented with the fact that individuals associated with the company had not authorized the check, and signers on the account had not authorized the check.

THE COURT: Right.

MR. BHATIA: The government has learned that the three signers on the account, the signers on the two victim accounts, were the people identified in the particulars here.

THE COURT: Right. I'm not stating you don't have a factual basis. The question is what was to be presented to the jury here? It needs to track the indictment returned by the grand jury. So the question is what is meant when you say "an individual"? Was that a somewhat inexact way of saying three individuals?

MR. BHATIA: I think it was an inexact way of saying three individuals.

THE COURT: What was presented to the grand jury? Was the grand jury presented with the evidence substantiating that the personal identification of three individuals was --

MR. BHATIA: My recollection is that the grand jury was not presented with a single name. It was not presented with a victim. It was presented with --

K1AHTMC

1 THE COURT: All three?

2 MR. BHATIA: It was -- I shouldn't say it was even
3 presented all three. I believe it was presented with testimony
4 that no one associated with the company, as far as the
5 investigation has revealed, authorized the checks.

6 THE COURT: Right. But that goes to the fraud counts.
7 Here the issue is the personal identifying information of an
8 individual. The challenge for you here is that presumably
9 there was something before the grand jury that substantiates
10 that allegation. It doesn't sound as if there was an attempt
11 made to challenge the grand jury to any particular individual.
12 It sounds as if you're representing to me that the grand jury
13 had a basis for concluding that three separate people's
14 personal identification information was used on the check that
15 Teman deposited. Is that correct?

16 MR. BHATIA: The grand jury was not given a number of
17 authorized signers on the account. So the grand jury was not
18 presented with a name or two names or three names. But the
19 fact that, based on the investigation, whoever the persons may
20 be, person or persons may be, did not authorize the account --
21 or did not authorize the checks. So the grand jury was not
22 presented with one name or two names or three names.

23 THE COURT: All right. They were presented, rather,
24 with the idea that the identifying information of people
25 associated with the entity was used?

K1AHTMC

1 MR. BHATIA: That's correct.

2 THE COURT: Not the specifics of that?

3 MR. BHATIA: I think that's a more succinct way of
4 saying that.

5 THE COURT: Be that as it may, there's no obligation
6 that that's the means by which you present the case to the
7 grand jury. The issue is suppose the jury here, six of them
8 think that Rebenwurvel's personal identifying information was
9 used and six of them think that it's Hom or Haas and six think
10 it's Nuremberg, and there's no 12 that agree on any one person.
11 What do you do then?

12 MR. BHATIA: Your Honor, we are in tune to the
13 unanimity issues here. And, actually, I think we are intending
14 to submit an instruction regarding other parts of unanimity
15 involved in this case. Here, as I understand it, in terms of
16 the offense, the means of identification needs to identify
17 people. So I believe as the -- I believe there's not going to
18 be a unanimity requirement here, as long as the jury finds that
19 the means of identification were capable of identifying
20 specific people.

21 THE COURT: Well, let me ask you, just to make this
22 easier, did all these rise or fall together? I mean, is it the
23 same check that uses all three people's names?

24 MR. BHATIA: It's a check with sort of a squiggle
25 mark, and that is -- that's using the identification of one of

K1AHTMC

1 these three people.

2 THE COURT: Here's the sentence in the indictment:

3 "Teman deposited a check using the personal identifying
4 information of an individual associated with Entity 3." I
5 think you're saying to me that that check, therefore, must have
6 the personal identifying information of all three of the people
7 you are mentioning. Is that what you're saying?

8 MR. BHATIA: The check, yes, could identify those
9 three people, but it does not have the personal identification
10 information of each person.

11 THE COURT: I'm totally confused.

12 (Counsel confer)

13 MR. BHATIA: Your Honor, I can maybe provide some
14 clarity. Let me take Count Five, for example. The government
15 is alleging that the defendant deposited a check designed to
16 look as if it came from Coney Realty, and on that check has the
17 name of Coney Realty at the top, has the corporate entity and
18 then Coney entity, and it has the routing number associated
19 with a particular bank account, the account number, and it has
20 a sign, a signature, on it. The government has learned that
21 there are three authorized signers for that Coney Realty
22 account, and so the government's alleging that the defendant
23 used the means of identification of one of those three people
24 on the check.

25 THE COURT: I see. I'm sorry. So when you say he

K1AHTMC

1 deposited a check, the locution isn't clear to me whether that
2 means that the personal identifying information is literally
3 physically on the check or it was used in connection with a
4 deposit by some means other than writing it on the check. Just
5 help me with that. What does he do?

6 MR. BHATIA: What I mean is that by including the
7 signature there, along with the routing number and the name of
8 the account, the defendant is essentially seeking to mimic one
9 of those people to demonstrate, as the government believes,
10 fraudulently, that he had authorization to deposit the checks.
11 So the signature is co-opting the means of identification of
12 those three people.

13 THE COURT: Let me get this right. You're not saying
14 that he, separate from what appears on the check, does
15 something with someone's identifying information. He doesn't
16 hold up a fake driver's license or something like that. The
17 entirety of the allegation about the personally identifying
18 information of this individual is physically contained on the
19 physical check itself, is that correct?

20 MR. BHATIA: That's right.

21 THE COURT: All right. Does it have the name of any
22 of these people on that check in any place?

23 MR. BHATIA: The check does not.

24 THE COURT: Does it have the signature or purported
25 signature of any of those people on the check?

K1AITEMC

1 MR. BHATIA: It has a purported signature on that.

2 THE COURT: To the extent it's legible, what does it
3 say?

4 MR. BHATIA: It doesn't -- the signature at least -- I
5 don't think it appears to be one of those three people.

6 THE COURT: All right. Is there any other identifying
7 information -- name, rank, serial number, social security
8 number, date of birth, DNA? Is there something about addresses
9 or something about any of those people that appears on the
10 check?

11 MR. BHATIA: No, your Honor.

12 THE COURT: So you have a signature. If you read
13 aloud the word on the signature, is the signature the name of
14 the corporate entity or the name of the individual?

15 MR. BHATIA: I don't think you could read aloud the
16 signature.

17 THE COURT: So how does this count get to the jury?
18 In other words, what's the means of identification of another
19 person here? I understand that you're saying that he pretends
20 to be the corporate entity or pretends to be a representative
21 of the corporate entity, and that's all good and fine as a mean
22 and method of the wire and bank fraud. Got you loud and clear
23 on that. But aggravated identity theft, I'm struggling with
24 that a bit. Walk me through that.

25 MR. BHATIA: Your Honor, I believe under the statute

K1AHTMC

1 it's the means of identification that together -- or I think
2 it's something to the effect of together or in combination with
3 can identify another person. Here, using the corporate account
4 and the account number and the name plus the signature could
5 lead someone at the bank to conclude, for example, Peter
6 Rebenwurvel must have signed this check. So we believe that
7 that is the valid basis for an aggravated identity theft count.

8 THE COURT: Whose identity is being misused? Is it
9 Peter's? Is it the company? Whose identity is being stolen
10 here? Is it the individual associated with the corporate
11 entity or is it the corporate entity?

12 MR. BHATIA: It's the authorized signers for that
13 account.

14 THE COURT: Let's go to the elements. Let's put aside
15 the "to wit" clause for a moment.

16 He knowingly transferred, possessed, and used,
17 according to the indictment, without lawful authority a means
18 of identification of another person. What means of
19 identification are connoted by Count Five?

20 MR. BHATIA: The signature is the -- I believe that
21 the signature taken in combination with the account number and
22 the name is the means of identification of another person.

23 THE COURT: So any defendant who forges a check on
24 somebody else's account is committing aggravated identity
25 theft, even if they don't present any evidence/statement saying

K1AHTMC

1 I'm that person? It follows, right, just if you sign as
2 somebody, you are using a means of identification, right?

3 MR. BHATIA: I believe it's right, your Honor, that --
4 check fraud is sort of the prototypical example of aggravated
5 identity theft when we've taken a look at the legislative
6 history on this point. So for that reason, we think --

7 THE COURT: Right, check fraud is usually -- in the
8 classic aggravated identity theft. It's more than simply
9 boldly going into a bank and depositing it into Judge
10 Engelmayer's account a check written out to Judge Judy. It's
11 more that I would present -- it's usually the identification
12 substantiating the other identity that would be used, and
13 that's usually -- not that that's the only way, but that's
14 usually the way in which those cases manifest. What you're
15 saying is the deposit into person A's account of a check made
16 out to person B, something like that is in and of itself,
17 without more, aggravated identity theft.

18 I can't resolve that here and now, but it does seem to
19 me this is not so much a *Brady* issue, as it's been explicating,
20 it's an issue of whether or not the evidence that you are
21 committing to me is really the only evidence of aggravated
22 identity theft, what's contained on the check, meets the legal
23 requirements for that count. I don't think -- defense counsel,
24 you've raised a valid issue, but I think you've mispackaged it.
25 It's not a *Brady* issue. The government's explained to me now

K1AHTMC

1 that, in effect, whereas they said one, they're saying three
2 now because it could have been any of those people who are
3 authorized signers; and therefore, the presentation of the
4 check, in the government's theory, is a form of theft of any
5 authorized signer. I don't think that's a Brady issue. It's
6 really a sufficiency issue of whether or not the means of
7 commission here satisfied aggravated identity theft.

8 I think the right way to go here is by your taking a
9 close internal look at this question. There's no value in our
10 going to the jury -- if, ultimately, the conduct you've
11 described can't get to the jury, there's no point in starting
12 there. So why don't you dig into it and get me a letter by
13 Wednesday that explains what evidence will be used to show the
14 crime of aggravated identity theft and what the law is as to
15 whether or not it can get to a jury.

16 MR. BHATIA: Your Honor, we'll put in that letter, and
17 I'll make two -- I'll just say two things: One, we have
18 conferred internally within the office, including with our
19 appeals unit, about this issue. It's something that we spoke
20 to them about. Of course we'll put in the letter.

21 The second is, of course, the caveat that I have to
22 make, which is that our investigation continues, and we'll
23 continue our investigation up until and through trial.

24 THE COURT: That's all fine and good, but you've got
25 charges here right now. And I understand that if you can

K1AHTMC

1 develop evidence that he walked into the bank and presented the
2 social security card for Peter Rebenwurvel, the case looks
3 different. But on the assumption that this crime is over and
4 done and is limited -- the evidence is limited to the check
5 itself on which, I take it, handwriting that is not legible as
6 any particular person's but is treated by the bank as some
7 authorized signatory of the corporate account holder, the
8 question is whether that alone is aggravated identity --

9 MR. BHATIA: Understood.

10 THE COURT: -- and what we do with (a) the inability
11 to argue that it's any particular person's identity, but (b)
12 even if it was just one signatory, whether simply the
13 presentation of a check, as much as that might be bank fraud
14 and wire fraud, is also aggravated identity theft without more?
15 I think I need a letter along those lines. Why don't I give
16 you till Wednesday.

17 Defense, if you want to respond, you've got till
18 Friday. When I meet with you on Tuesday morning, assuming the
19 government is still pursuing that count and assuming the
20 defense is still arguing that the claim is unsustainable, I'll
21 hear from you then. I would very rarely dismiss a count before
22 we started the trial, but the law does permit, where the
23 government gives what it acknowledges to be a thorough going
24 proffer of all the evidence, it does give the Court authority
25 to do that. I'm reluctant to do it other than that, but if

K1AHTMC

1 you're literally committing to me that the only relevant
2 evidence is going to be the check itself, there is a basis on
3 which the Court can legally make that determination. So
4 please, please take a close look at it.

5 But, look, Mr. DiRuzzo, I think you're the one who
6 raised this issue. I don't think it's really a Brady issue.
7 You now understand why the government said what it said.

8 MR. DIRUZZO: I do. But, obviously, I don't have the
9 benefit of what was said before the grand jury. I could very
10 well imagine if someone testified initially that it was Peter
11 Rebenwurvel and then now someone's testifying that it's not
12 Peter but it's Peter and maybe other people but we're not
13 entirely sure, the shifting testimony before the grand jury
14 could very well be Brady.

15 THE COURT: Let me ask the government counsel, without
16 telling me the content of what came before the grand jury, are
17 you aware of any witness who has changed their testimony as to
18 any of the events that we're talking about or their version of
19 events, as opposed to the government's understanding of who the
20 signers of -- the eligible signers were that has changed?

21 MR. BHATIA: I'll give, first, the caveat that I have
22 to give. I wasn't in the grand jury the first time.

23 THE COURT: You have assuredly reviewed the
24 transcript.

25 MR. BHATIA: I have. I believe it's the former of

K1AHTMC

1 what you said -- or it's the latter, I should say. It's new
2 evidence and continuing investigation. But we'll go back and
3 confirm that there's nothing we need to disclose that's Brady.

4 THE COURT: If there was somebody at the bank who
5 originally said he said he's Peter Rebenwurvel and then later
6 said the defendant said he's one of the following three people
7 or he's not Peter Rebenwurvel, then you're in potential
8 Brady-land. If instead what happens hand is the government has
9 developed a more sophisticated understanding of who the
10 authorized signatories are, it's not a Brady issue. The
11 government is entitled to refine its charges as it understands
12 the facts. That's not Brady.

13 The issue, though, is a different one that your
14 question raises which is, is the conduct described aggravated
15 identity theft? I've never had occasion to look into it.
16 Perhaps Mr. Bhatia is right. It's certainly not the paradigm
17 of the way we think of the offense, but that's not to say it's
18 not the offense. So a letter is the way to smoke that out.

19 Anything further about the trial before we return to
20 the grand jury issue?

21 MR. GELFAND: Trial, no, but one other pending letter
22 motion. We'd filed a request permitting Mr. Teman to travel to
23 St. Louis where my office is based.

24 THE COURT: Does the government object to Mr. Teman's
25 traveling to St. Louis where, I take it, one of his lawyers is

K1AHTMC

1 based?

2 MR. BHATIA: No objection.

3 THE COURT: Has Mr. Teman been in any way out of
4 compliance with the terms of his pretrial release?

5 MR. BHATIA: I haven't spoken with the Pretrial
6 Services officer recently. I do understand from a
7 representation from defense counsel that they did -- am I right
8 -- that they did speak to the Pretrial Services officer who had
9 no objection.

10 MR. GELFAND: Your Honor, for the record, I spoke with
11 the New York pretrial officer and with the Southern District of
12 Florida pretrial officer, both have expressed no objection to
13 that.

14 THE COURT: I'm going to trust, as an officer of the
15 court, your representation of that.

16 What is the state of Mr. Teman's travel documents?
17 Does he have -- I mean, he doesn't need a passport to travel
18 with, correct, to travel to St. Louis with?

19 MR. GELFAND: No, he just as a Florida driver's
20 license.

21 THE COURT: Who's got his passport?

22 THE DEFENDANT: Your Honor, I believe the Florida
23 probation or court.

24 THE COURT: Pretrial. Look, Mr. Gelfand, given the
25 government's consent and your representation that pretrial

K1AHTMC

1 consents, I'm fine with it, but I don't want this to be an
2 occasion for him to get his hands on a passport that was taken
3 away as part of the bail package. I assume he, like the rest
4 of us, can travel domestically without a passport.

5 MR. GELFAND: Yes, your Honor. He wouldn't travel the
6 same way he traveled up here from Florida for court.

7 THE COURT: In that case, I will authorize it. Please
8 get me an agreed order today. I'm out next week. Get me an
9 agreed order today. It doesn't need to be agreed. It can be
10 from the defense along the lines that I described. I'll be
11 happy to authorize it.

12 MR. GELFAND: Thank you.

13 THE COURT: Very good. Anything further besides the
14 grand jury matter?

15 MR. BHATIA: Nothing, your Honor.

16 THE COURT: All right. Let me then briefly take up
17 that last matter.

18 All right. I have this morning spoken with Judge
19 Kevin Castel. He is the Part 1 judge, and --

20 MR. GELFAND: Your Honor, I'm sorry to interrupt you.
21 I just wanted to note for the record, just so I'm on the right
22 side of where I need to be, obviously, I represent Mr. Teman
23 admitted pro hac vice. I am not entered on the grand jury
24 matter, and I wanted to raise that with the Court. I'm not
25 sure that --

K1AHTMC

1 THE COURT: Sorry. Who represents the -- it's
2 Mr. DiRuzzo?

3 MR. DIRUZZO: Correct, your Honor.

4 THE COURT: Given the highly general statement I'm
5 about to make, I don't think there's any problem with your
6 presence.

7 MR. GELFAND: OK.

8 THE COURT: But thank you for your candor about that.

9 MR. GELFAND: Thank you.

10 THE COURT: I've spoken with Judge Castel. He is the
11 judge sitting in Part 1. He is the judge to which, in the
12 first instance, grand jury matters are properly addressed. He
13 has referred the matter to me in an order that assigns the
14 grand jury dispute to me, given its obvious connection to this
15 current proceeding, will issue today. So, briefly, I have
16 received from Judge Castel this morning the defense petition to
17 quash three grand jury subpoenas dated December 18 directed at
18 three entities associated or said to be associated with
19 Mr. Teman, and I have received on Wednesday night from the
20 government as, I guess, a courtesy copy its opposition. I also
21 received, I guess, as a courtesy copy as well, an *ex parte*
22 letter from the government addressing these matters.

23 I will note that I think the letter was actually
24 addressed to me as the trial judge in the case, even though
25 this is a grand jury matter. Until I spoke to Judge Castel

K1AHTMC

1 this morning, this was not my matter. You really have to be
2 faithful about addressing these things to the judge responsible
3 for them, Judge Castel.

4 That said, there was ample good reason for it to be
5 transferred to me. The issues that are litigated by the
6 defense, in particular, involve this case insofar as the
7 defense is claiming that the grand jury subpoena either was
8 intended to or could function as a way of getting trial
9 evidence. So it's quite proper that it winds up with me, but
10 as a formal matter, in the initial -- in the first instance, it
11 was for the Part 1 judge.

12 In any event, now that the matter is in my court, I've
13 reviewed these materials. I will state for the record that the
14 government's *ex parte* letter was appropriately submitted *ex*
15 *parte*. It concerns core grand jury matters as to which grand
16 jury secrecy applies. Mr. Teman and these companies have
17 absolutely no right to any notice of the matters that are
18 reflected in that letter.

19 Here's how I intend to proceed. I'm going to give the
20 defense until Friday, January 17, to respond to the
21 government's public submission, that is to say, the non-*ex*
22 *parte* submission. I'm not going to invite argument on these
23 matters at this time, and that's for a couple of reasons.

24 First of all, I haven't adequately studied the issues
25 presented. I just spoke with Judge Castel this morning and

K1AHTMC

1 have arranged the reassignment to myself with his consent, and
2 I am interested in getting Mr. Teman's reply before I do so.

3 Second of all, the purpose of this conference is the
4 upcoming trial, not a separate grand jury proceeding. So I'm
5 not inviting argument or discussion today on the defense
6 application to quash the subpoena.

7 For avoidance of doubt, I note that Mr. Teman is
8 arguing really two things. One is there's a Fifth Amendment
9 privilege that protects against the production that's requested
10 here. Second, he's arguing that the grand jury subpoena is
11 being used by the government predominantly for an improper
12 purpose, that is to say, as a means of gaining evidence for use
13 in the upcoming trial. Now, the government properly notes that
14 at the time the subpoenas were issued on December 18, the grand
15 jury had not yet been asked to return and hadn't returned the
16 S2 superseding indictment. The accusation that the defense
17 makes is a bit out of time in the sense that at the time the
18 subpoena was returned, we know for a fact that the government
19 was in the superseding process. So there was an open grand
20 jury matter relating to this case, putting aside whatever else
21 the grand jury might or might not be investigating. So there's
22 assuredly at the time a valid grand jury purpose for the
23 subpoena.

24 Even if I need to say this, the date, December 18, on
25 which the subpoenas were issued, called into significant

K1AHTMC

1 question whether it was at all realistic that there would be a
2 production in response that would come in before the date the
3 government had to get to the grand jury to supersede as it had
4 promised to in this case. Be that as it may, there was an open
5 grand jury proceeding.

6 At this point, however, the fact for all of us is that
7 the grand jury has returned its superseding indictment. It did
8 so on January 3, and so whatever else the grand jury may or may
9 not be investigating as to the charges that Mr. Teman will face
10 in the trial beginning January 21, those charges are set. They
11 may be reduced if there's a basis for a voluntary dismissal or
12 dismissal by the Court of some charge, but there's not going to
13 be an expansion. Those charges are set. In other words, there
14 won't be any further superseders prior to the date of trial as
15 to what Mr. Teman is being tried on beginning January 21.

16 So Mr. Teman's concern at this point is that whatever
17 the government's intentions had been as of December 18 when it
18 had an ongoing grand jury proceeding relating to this trial, to
19 the extent that the government might be pursuing compliance
20 with a subpoena so that they could be -- the return could be
21 used in connection with this case, that purpose would not be
22 proper because the indictment is already in place and can't be
23 superseded.

24 So here's the easy way to resolve this issue. My
25 intention is going to be to resolve the grand jury privilege

K1AHTEMC

1 dispute shortly after the completion of the trial. That way,
2 by definition, that will be in a few short weeks. That will
3 moot any possible claim that the grand jury subpoena, even if
4 issued with pure purposes, is at this point being pursued for
5 the purpose of bolstering the government's trial proof in an
6 already indicted case. I will resolve the issue promptly after
7 the trial is resolved, assuming that there is a verdict as
8 opposed to a hung jury. There can't be any claim at that point
9 that the government's insistence on continued compliance with a
10 grand jury subpoena is aimed at bolstering its trial proof.
11 That's the clean and easy way to resolve the issue here.

12 Any objection to that?

13 MR. DIRUZZO: No, your Honor.

14 MR. BHATIA: No, your Honor.

15 THE COURT: All right. So we'll go that route.

16 Anything further from anyone?

17 MR. GELFAND: Just two quick questions, your Honor.

18 One, does the Court have a preference as to whatever numbering
19 convention the defense uses for exhibits? I know some courts
20 do.

21 THE COURT: Sequential would be great.

22 MR. GELFAND: A, B, doesn't make a difference?

23 THE COURT: Prime numbers. Right, you can use letters
24 or numbers, no. But, look, I would ask you, to the extent
25 there are defense exhibits that are offered during the course

K1AHTMC

1 of the trial, make sure that you've -- I expect the
2 government's daily log of what's been received will include
3 defense exhibits. I'm looking for a one-stop shop. You should
4 look at that to make sure that they're accurately tabulating
5 any defense exhibits that have been received.

6 MR. GELFAND: Absolutely. Just one other quick
7 housekeeping question. It sounds like, based on the
8 government's representation, there's virtually no chance that
9 if we have any defense witnesses, that they're going to have to
10 be here before Thursday. Is that fair? I don't want to -- if
11 I don't need to, I don't want to inconvenience anyone more than
12 I have to by telling them --

13 THE COURT: Mr. Bhatia, what is the earliest
14 conceivable date on which the government could rest?

15 MR. BHATIA: Your Honor, I think, of course, we always
16 give a conservative estimate for what we think will be the
17 trial, but on the earliest that we could conceivably close, I
18 believe it's probably sometime Wednesday. Then, of course,
19 that depends on the length of cross and how the evidence comes
20 in, but it could be sometime Wednesday.

21 THE COURT: There you have it.

22 MR. GELFAND: We can work with that.

23 THE COURT: Look, I appreciate that the witnesses in
24 question may be coming from other states, or maybe not?

25 MR. GELFAND: I don't believe so, your Honor.

K1AHTMC

1 THE COURT: Well, then --

2 MR. GELFAND: We'll make it work.

3 THE COURT: The legal principle of no big deal
4 probably applies here, right? If it's in the same state, you
5 can take stock at the end of the day Wednesday of how things
6 are going. I'm happy to ask Mr. Bhatia, at your request,
7 whether at that point it's clear that the government will fill
8 the day on Wednesday. But if, in fact, there's a scenario
9 under which the government's going to rest and there's enough
10 time to have the usual Rule 29 colloquy and then you might be
11 on the clock, I think you will need to have that person there.
12 I really am serious about using all of our time.

13 MR. GELFAND: No problem, your Honor. Thank you.

14 THE COURT: Very good. Yes.

15 MR. DIRUZZO: Judge, my experience trying cases, I
16 find that judges kind of have three different buckets for
17 openings for exhibits. Some judges will say if it's not
18 admitted, you can't publish it, you can't refer to it, you
19 can't show it to the jury in opening. You can refer to it in
20 the abstract. There are other judges, if everyone agrees it's
21 coming in, you can refer to it, maybe put up on the ELMO in
22 opening. I just want to get your take because I don't want to
23 get an objection.

24 THE COURT: I'm not going to answer an abstract
25 question. I've had the occasional civil case where it's clear

K1AHTMC

1 that the copyright infringing video's coming in, and it's an
2 incoherent opening without it. This is not that case.

3 What do you have in mind?

4 MR. DIRUZZO: Like the contracts, in particular.

5 THE COURT: The government?

6 MR. BHATIA: Your Honor, I think it might be helpful
7 for us to confer with the defense on this. Right now I'm not
8 sure what contracts in particular they're referencing. I'm not
9 really aware of any contracts, but I don't know what contracts
10 in particular, so it's hard for us to answer that question.

11 THE COURT: Let me ask the question. Mr. DiRuzzo, I
12 can't remember a criminal case in which, other than something
13 like a map, I've allowed counsel to use exhibits during the
14 opening. It's just a little too fraught because we don't know,
15 in a criminal case, what's going to come in and what's not.

16 MR. DIRUZZO: I understand, Judge.

17 THE COURT: So absent explicit authorization of the
18 Court, you are not to use exhibits in the opening statement.

19 MR. DIRUZZO: OK.

20 THE COURT: That's easier. If you confer with the
21 government and everyone agrees that something's clearly coming
22 in, I will reconsider, but even then, unless I've affirmatively
23 authorized it, no exhibits in the opening, and you should
24 prepare accordingly.

25 MR. DIRUZZO: OK. Thanks, Judge.

K1AHTMC

1 THE COURT: Anything further from anyone?

2 MR. BHATIA: Nothing, your Honor.

3 MR. GELFAND: Can we just confer with Mr. Teman for a
4 moment?

5 (Counsel confer)

6 MR. GELFAND: We have nothing further, your Honor.
7 Thank you.

8 THE COURT: All right. Before we adjourn, I want to
9 just take a moment and compliment and thank everyone for the
10 level of attention to detail that went into all of the motions
11 that preceded the conference. That helps me. As a result of
12 your raising those issues early, you've come out of this
13 conference with a pretty good sense of what the ground rules at
14 trial will be and what's in and what's out. Keep doing that.
15 Although I will be away teaching next week, I will be getting
16 things from chambers. If there's some other dispute that
17 arises, to the extent I can helpfully resolve it beforehand or
18 at least answer it on Tuesday morning, I'm happy to do so, but
19 we all benefit by clarity of ground rules, so keep it up.
20 That's very valuable to me.

21 Government, with respect to Counts Five and Six, I'm
22 not telling you what to do. You'll make your own judgment
23 about whether or not the law permits you to get to a jury on
24 the theory of aggravated identity theft that you have here. I
25 would urge the government to reflect on what that theory, those

K1AHTMC

1 counts, add to the four preceding counts. In other words, if
2 the theory is a lack of authorization, it's not obvious to me
3 that there's a scenario under which Counts Five or Six come out
4 in your favor and Counts One through Four do not. I could be
5 wrong about that. Maybe I'm missing something, but you ought
6 to be having a thoughtful conversation whether it adds more
7 heat than light to add on to those counts if there aren't more
8 facts than the ones you have proffered to me in support of
9 those claims. Your choice. Just saying.

10 MR. BHATIA: Thank you, your Honor.

11 THE COURT: All right. Thank you. We stand
12 adjourned.

13 (Adjourned)